بَاكُورَةُ ٱلسَّعْد

المعروفة

برسالة ابن ابى زيد

FIRST STEPS

IN

MUSLIM JURISPRUDENCE

CONSISTING OF EXCERPTS FROM

BĀKŪRAT-AL-SA'D

OF

IBN ABŪ ZAYD

WITH

ARABIC TEXT, ENGLISH TRANSLATION, NOTES, AND A SHORT HISTORICAL AND BIOGRAPHICAL INTRODUCTION

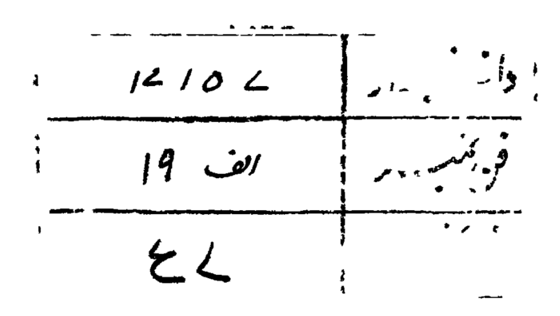
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RESPECTFULLY DEDICATED

TO

SIR GEORGE CHARDIN DENTON. K.C. M.G.,

GOVERNOR AND COMMANDER-IN-CHIEF OF THE COLONY OF THE GAMBIA,

IN RECOGNITION OF HIS EFFORTS FOR THE IMPROVEMENT OF THE CONDITION OF HIS MAJESTY'S MUSLIM SUBJECTS ON THE WEST COAST OF AFRICA.

PREFACE.

In offering this little work to the public, it is necessary to say a word or two with regard to its purpose and the circumstances to which its appearance is due. In the first place it is hoped that it may be of general use to English students commencing the serious study of Arabic, with a view whether to the Indian or to the Egyptian service: its immediate *raison d'être*, however, is of a more special nature. The recognition of Muslim law, and especially such portions of it as relate to family rights, (marriage, succession, wills, gifts etc.) in our West African Colonies and Protectorates, has created a need for some handbook in which the principles (at least) of that law might be studied by commissioners and other legal officers on whom mainly falls the responsibility for its due administration. Unfortunately, at the present moment there is no work in the English language quite suitable for this purpose. Of general introductions to the study of Muslim law, it is true, two excellent examples are afforded in Sir R. K. Wilson's "Anglo-Muhammadan Law" and Mr. Ameer Ali's "Student's Handbook of Mahommedan Law": but both are written with a view particularly to Indian judicial arrangements and from a Ḫanafī standpoint. On the West African Coast, (as also over most of the

north-west of the continent) on the other hand, the rite of Mālik holds exclusive, or all but exclusive sway; and what, therefore, is required is a manual setting forth concisely the doctrines of that school. As a stop-gap, until some more complete work can make its appearance, it is hoped that these excerpts from Ibn Abū Zayd's treatise, together with the simple notes which we have subjoined, may prove acceptable to those for whom they are specially intended.

The Arabic text has been printed along with the translation for two reasons. (*a*) For the lawyer or administrator who is to take a useful part in the practical application of Muslim law, it is of the greatest importance, indeed one may almost say indispensable, to have some acquaintance with the original. To deal with questions involving the *status* and most important rights of one's fellow-subjects, relying solely upon translations and manuals in some European tongue, is to "swim on bladders" in deep water: the fact must be recognised at the outset, that here is no shallow study to be taken up and mastered in a few weeks, but a vast science in which the genius of the same people which gave arithmetic, algebra, trigonometry, astronomy, optics, chemistry and medicine to the western world, and generally stood at the cradle of modern science, has exhibited itself in all its power and exactitude. To acquire, therefore, the technology of the subject is the first and indispensable step towards sound knowledge: and for the encouragement of the beginner it may be added that, despite the marvellous and well-nigh inexhaustible richness of the Arabic

language in the domain of *belles lettres*, the conventional language of Muslim law is by no means so copious or varied as to defy any really earnest student; while the justness and preciseness of its employment will even at an early stage rouse his appreciation.

(*b*) The second reason is almost the converse of the first. It is the authors' earnest hope that this little work, besides being useful for English readers in approaching the study of Arabic, may turn out to be serviceable also in some instances to Arabic scholars, both in West Africa and in Egypt, in acquiring a better knowledge of the English language. We have found ourselves in the course of considerable practical experience among natives, that a man may have a good knowledge of the one tongue, and considerable familiarity with the colloquial employment of the other, and yet be quite incapable of accurately rendering even a simple legal passage from the latter into the former, still less from the former into the latter. There exists among the un-Europeanised natives of the West Coast of Africa at the present day an amount of Arabic or semi-Arabic culture which is only now coming to be realised: among those who are Europeanised, on the other hand, western education has made great strides, and is making greater every day. The regrettable point is that few, if any, persons can be found properly equipped with both; while the vernacular speech of the country or tribe is useless, from its lack of technical development, for the conveyance of any beyond simple ideas. The situation is a curious one—two great languages, each forming a *lingua franca* for indigenous

tribes as little known to the average inhabitant of the one country as they were to the Prophet of the other; and between the two, so far as law or grammar or any scientific subject is concerned, no communication, no bridge of any kind.

The "First-fruits" of Ibn Abū Zayd is in itself too small a bridge to span so wide a gulf; but if it can contribute in any way towards laying the foundations, its publication will not have been in vain. Already, in its original form, in the hands of great numbers of natives on the Coast, it ought in any case to receive some measure of welcome, such as is due to an old friend though dressed in a foreign garb.

In the notes we have occasionally made use of the excellent commentaries of al-Sharnūbī, Abū-l-Ḫasan and al-ʿAdawī. But in general, keeping in view the educational purpose for which this edition is intended, and seeking to avoid adding anything which would complicate the subject by the importation of new matter not essential to the comprehension of the text, we have inserted instead short explanations of our own as being more in accordance with this purpose. Some apology may seem due for the numerous appendices relating to Succession: but those who have themselves striven to master, still more to exhibit in a clear light for the guidance of others, the intricacies of that most troublesome branch of the law, will appreciate the impossibility of rendering intelligible even the general outlines of the subject as given by our author without running to considerable length. We have, it may be said, done our utmost to be concise and at the same

time simple: among other expedients to that end, making extensive use of cross-references within brackets so as to avoid digression and repetition.

We crave the indulgence of critics for mistakes, whether of omission or commission, which may be discovered in the work. Official and other duties, and the immense amount of labour involved in the preparation of a larger and more important work, have resulted in scant justice being done to what is truly a *parergon*. But the object in view being, not to offer to the world an exact compendium of the law, but merely to smooth the path of the student at the outset, it is hoped that what is good in the book may outweigh the defects and render it acceptable.

We have taken certain liberties with the text, which critics, it is hoped, may find excusable in view of the practical purposes aimed at in the preparation of this edition. We have, to begin with, selected only such portions of the original work as deal with those branches of the law which already have received, or it is believed are likely to receive, express legislative recognition in our West African Colonies, viz: civil status, marriage, succession, gifts, wills, and guardianship. We have omitted all references to the institution of slavery as being without general utility at the present day. We have divided the text up into three hundred and six separate rules, which we have numbered in Arabic characters, indicating the English translation of each by the corresponding European number: this arrangement, to which the concise and disconnected style of Ibn Abū Zayd's *dicta* naturally

lends itself, will, it is hoped, render matters clearer for the beginner, and also facilitate reference. The system of transliteration adopted is, with a few exceptions, that recommended by the Geneva Congress of Orientalists. In the translation of the rules, we have rendered the Arabic technical terms by English equivalents, sanctioned in general by the usage either (a) of Anglo-Indian writers, such as Hamilton, Ameer Ali, Wilson, etc., or (b) of Perron, Seignette, Zeys, and other French authorities; selecting in every case such expressions as seemed best fitted to convey to the beginner a correct understanding of the principle involved. In the notes, on the other hand, we have in a good many instances employed the original terms (walī, waṣī, ʿiddah, etc.,) as being shorter and more precise.

In conclusion we desire to express our indebtedness to Dr. Blyden of Sierra Leone for having brought to our notice the need existing for an English translation of the Risālah and the kind encouragement which he has given us in the enterprise. We can only regret that his multifarious other labours should have prevented this distinguished Orientalist from himself undertaking the work.

16th February, 1906.

INTRODUCTION.

GENERAL CHARACTERISTICS OF MUSLIM JURISPRUDENCE.

If there is one quality distinguishing above all others the legislative work of the Prophet of Islam, it is the quality of moderation. "Truth lies in the middle," خير الامور اوسطها :[1] in his unswerving adherence to this maxim lies the proof of his mission as a practical guide for human conduct, and the explanation of the permanence, during upwards of thirteen centuries enjoyed by the religious, and jural institutions which he framed. While other systems of jurisprudence have grown up, and run their course and passed away — or at the best have altered their whole character in such a manner that only the student of antiquities can identify in the living form the traces of the past — Muslim law remains at the present for all practical purposes the same as it was at the commencement. Within the sphere of family relations, (marriage, succession, wills, gifts etc.) more especially, it has undergone hardly any modification since the days of the author (born 312, died 389 A.H.) whose little work is here presented to the public. How is this unexampled continuance, this marvellous vitality, to be explained? The secret lies (1) in the moderation

[1] Cf. Kur-ān, 2, 137: "Thus have We made you a middle nation etc.": وَ كَذٰلِكَ جَعَلْنٰكُمْ اُمَّةً وَّسَطًا الآية.

already referred to as exhibited by the great founder; (2) in the manner in which the spirit was caught by his immediate followers and carried by them into every branch and detail of the great legal systems which their learning and enthusiasm built up from the foundations laid by the master.

It will stand the student in good stead if he will bear this principle in mind as he advances into what might otherwise seem the needless complications of Muslim jurisprudence. "Truth lies in the middle"; but the difficulty is to find the middle, or, having found, to follow it through every branch and detail of social relations.

EXAMPLES OF THE MIDDLE COURSE CHOSEN BY THE PROPHET IN LEGISLATIVE MATTERS.

SLAVERY.

At the time when the Great Arabian lived, the institution of slavery existed everywhere throughout the world. In Arabia it prevailed extensively. That Muhammad wished to discourage slavery is certain [1]: notwithstanding this, we know him to have extended to it an implied and reluctant recognition. Why? Because slavery had a good side as well as a bad: the good side was that it mitigated the atrocities of

[1] لقد اوصانى حبيبى جبرائيل بالرفق بالرقيق حتى ظننت ان الناس لا يستعبد ولا يستخدم:

"Verily my friend Gabriel continued to enjoin on me kindness to slaves until I thought that people should never be taken as slaves or servants". Hadīth cf. Kur-ān, **90**, 14.

war. Tribal warfare went on throughout Arabia: war on a wider scale was about to commence with the outside world: in the former, in the latter, captives were or would be spared with a view to disposal in the slave-markets. To prohibit slavery was to decree the slaughter of all captives: this the Prophet saw, and for this reason, we may believe, more than for any other, he chose a middle course, viz: while tolerating the relation of master to slave, to strictly forbid any abuse of power by the former, and by the recognition of numerous methods by which slaves might, and occasions upon which they ought to be liberated, to promote the speedy enfranchisement of the whole population.

CONDITION OF WOMEN.

Arab women in the time of Muhammad were like chattels in the hand of their fathers, or of their husbands. In a not very remote past, however, it would appear, matters had been otherwise: descent was traced, not through males, but through females, and children belonged, not to the father's, but to the mother's tribe; with the result that women frequently acquired great wealth and influence, and enjoyed what according to all civilised ideas of morality must be considered an excessive freedom with regard to their relations with men. The Prophet took the middle course: he upheld the authority of the husband over the wife, as the surest safeguard of the honour and happiness of both; but laid down strict rules with regard to the manner in which wives were to be treated; not merely with

regard to the necessities of life, lodging, food, clothing etc., but with regard to the husbands' mode of conversing with them, the companionship which it was his duty to supply, etc., etc.

SUCCESSION.

In Muhammad's time, when a man died, his whole belongings passed to his nearest agnate (or male relative through males), who was of age and capable of bearing arms; e. g. his sons or son's son, his father or his brother etc. Maternal relations had no right to any share, while step-mothers were in a still worse position, inasmuch as they passed absolutely to the heir, who might retain them as wives or dispose of them by sale. This was the working-out of the system of descent through males. On the other hand, under the older system by which children were reckoned as of the mother's tribe, property would devolve from a man, not to his son, but to his sister's son, and the maternal bond was all-important. A remembrance at least of this earlier system lingered in the sympathies of the people; and the close and warm relations commonly existing between a man or a woman and his or her mother's relatives, came occasionally to disturb the natural course of devolution. Here, again, the course chosen by the Prophet was a middle one: he retained the more modern principle — as it then was in Arabia — of agnatic succession, but accorded recognition to the natural instincts of non-agnatic kinship, by assigning to the mother, (or failing her to

the maternal grandmother etc., a fixed share in the succession of the child), and granting her in case of repudiation the custody of her children till the age of puberty. Daughters also were admitted to share the succession along with sons, and sisters along with brothers, receiving as their share half that accorded to their brothers.

SCHOOLS OF MUSLIM JURISPRUDENCE.

A schism, dating back to the martyrdom of the great Caliph, ʿAlī, has divided the Muslim world into two great sects, known as: (1) Sunnīs; (2) Shīʿahs. It is with the former only that we have any concern in this little work; and the first point to note about them is that they are not themselves at one on all points, but on the contrary form no less than four distinct schools or rites. Chronologically, they may be enumerated thus: (a) Ḥanafīs, or followers of Abū Ḥanīfah, born at Kūfah 80 A.H., who, originally a Shīʿah, seceded from that party, and becoming a Sunnī distinguished himself equally by his subtlety and insight, and by the lengths to which he carried the process of analogical deduction (قياس). (b) Mālikīs, or followers of Mālik b. Anas, a judge in Medina, born 94, died 179 A.H., (795 A.D.) celebrated for the boldness and range of his decisions, but an upholder of tradition rather than of analogy, and author in the Muwaṭṭa' of the earliest considerable collection of ḥadīth extant. (c) Shāfiʿīs, or followers of Muhammad b. Idrīs al-Shāfiʿī, born at Ghazzah in Syria, 150

A.H. (819 A.D.), a strong traditionist, but relying also on analogy and agreement among the early jurists. (d) Ḫanbalīs, or followers of Aḥmad b. Ḫanbal, born at Baghdad 164 A.H., died there 241 A.H. (855 A.D.), a traditionist and author of a musnad or collection of authenticated reports of the sayings of the Prophet.

MĀLIKĪ RITE.

The Mālikī rite or school prevails in Upper Egypt, and over great part of the north and west of Africa. Of all the four schools it may perhaps claim the purest and most direct descent from the great lawgiver of Islam, free equally from the speculative tendencies which characterised the ʿIrāḳ jurists, and from the reactionary influences which had come to make themselves felt by the time that the two later schools came into existence. Somewhat rigid and formal perhaps on certain points as compared with the school of Abū Ḫanīfah, it has on the other hand the immense recommendation of having been from the outset a practical and living body of doctrine, growing up in the earliest home of the faith[1] and interpreted by real judges each of whom would in his time be the repository of of all that was best in the traditional practice and doctrine of the City. Mālik himself must have been in many ways a remarkable man: of good descent, he seems to have had every opportunity of acquiring sound knowledge; and of his many masters, he is

[1] Medina, "The City of the Prophet" (مدينة النبي).

reported to have said that there were few who did not subsequently come to consult him on some point of law. He would seem by one account to have been publicly proclaimed as the only muftī or consulting lawyer to whom it was lawful to go for advice. He was careful and precise in repeating traditions; and would never ride on horseback in Medina, out of respect for the city in which the body of the Prophet lay interred. An anecdote related by al-Shāfiʿī with reference to him is as follows: "Muḥammad b. al-Ḥasan said to me: 'Which of the two is the more learned, our master or yours?' meaning Abū Ḥanīfah and Mālik. 'Do you wish,' I said, 'that I should answer with impartiality?' He replied that he did, and I said: 'Then I ask you before God, which of the two is the more learned in the Ḳur-ān; our master or yours?' 'Yours, to a certainty,' he said. 'I again ask you seriously, which of the two is the more learned in the Sunnah; our master or yours?' 'Yours, to a certainty,' he replied. 'I now shall ask you,' said I, 'which of the two is the best acquainted with the sayings pronounced by the companions of God's apostle; our master or yours?' 'Why, yours, to a certainty,' was the answer. 'Then,' said I, 'there only remain the analogical deductions (قياس); and if they be not drawn from the three sources we have just mentioned, from whence can they be drawn'?" The great Imām's lack of subserviency and rigorous fidelity to principle seem to have called down upon him the wrath of the 'Abbasid dynasty: he was accused of declaring that an oath of allegiance taken to them was not binding,

and besides receiving a severe flogging was tortured by having his arm drawn out till the shoulder became dislocated. This treatment, however, only raised him still higher in public esteem; and he lived to a very advanced age, as much revered for his piety as honoured for his learning [1].

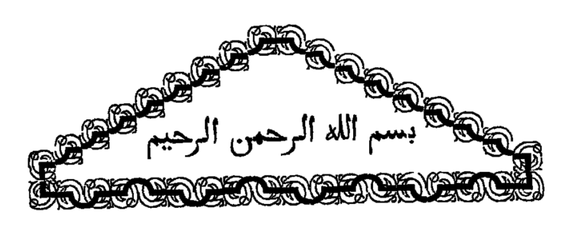
IBN ABŪ ZAYD.

This jurist, whose full name is Abū Muḥammad b. Abū Zayd [2], was born in K̲airawān 312 A.H. and died 389 A.H. He was surnamed "the little Mālik" مالك الصغير; according to one statement because he received the law from the founder of the rite by no more than two transmissions, viz., through two other great jurists, Ibn al-K̲āsim and Saḥnūn; but more probably on account of his learning and force of character. His little treatise on the law has for its full title the quaint description, Bākūrat-al-Saᶜd, "First-fruits of Happiness": it is, however, commonly known as the Risālah (i. e. treatise) of Abū Zayd. It is said to have been the first Muk̲h̲taṣar or summary of the law composed in the school of Mālik. The style is elegant and simple, copious use being made of expressions and passages occurring in the traditional utterances of the Prophet as contained in the Muwaṭṭa', and other dicta belonging to the early period of the

[1] Further particulars concerning Mālik will be found in Baron De Slane's translation of Ibn Khallikan, vol. II, p. 545 seq.

[2] Vide Ḥajji Khalfa, al-Mak̲k̲ari, Vol. I, 553, and the Kitāb--al-Dībāj-al-Muzahhab of Burhān-al-Dīn b. ᶜAlī.

law. The student who masters the concise rules here laid down, will, on his further advance into the intricacies of Arab jurisprudence, find that in each of them he possesses the key to some great controversy which has been waged among the jurists. To those on the other hand who have toiled through the endless pages of the great commentators, and striven to grasp the truth where it lies hid amid the prevailing technicality and formalism, the simple maxims here contained may perhaps be welcome also, as a relaxation or a summary.



باب في النكاح والطلاق والرجعة والظهار والايلاء واللعان والخلع والرضاع

اركان النكاح

١. و لا نكاحَ إلّا بوليٍّ وصَدَاقٍ وشاهدَيْ عَدْلٍ

٢. فَإنْ لم يُشْهِدَا في العَقْدِ فلا يَبْنِى بها حتى يُشْهِدَا

الصداق

٣. و أقلُّ الصَّدَاقِ رُبْعُ دينارٍ

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1. The enumeration of the constituents of marriage given by Khalīl and other jurists is: 1) a walī to represent the woman; 2) a dower for her benefit; 3) two spouses, both free from any legal impediment; 4) a formula of giving and accepting in marriage. Abū Zayd passes the third over, probably as being a matter of course: his omission of the formula, however, may be intentional, i. e. being based on the view that no particular form of words is necessary to constitute a marriage. As to his mention of witnesses, see below, rule 2, note.

2. The author refers to the duty of the walīs with regard to إشهاد i. e. specially calling in suitable persons to take notice of the marriage, so as to be able to give testimony at

CHAPTER I.

MARRIAGE, DIVORCE, RETURN, INJURIOUS ASSIMILATION, VOWS OF CONTINENCE, ACTIONS OF IMPRECATION, RELEASE AND FOSTERAGE.

CONSTITUENTS OF MARRIAGE.

1. There can be no marriage, without: (a) a matrimonial guardian; (b) a dower; (c) two irreproachable witnesses.

2. If witnesses are not called to the contract, consummation should not take place till two witnesses have been called.

DOWER.

3. The minimum dower is a quarter of a dīnār.

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any time when required. An omission in this respect, however, will not be fatal to a marriage duly consummated, provided that in point of fact two suitable witnesses can be found who, though not specially called, were present at the marriage. This is شهادة testimony, as distinguished from the اشهاد explained above. "The validity depends on testimony (شهادة), not on the point of witness being called on to take notice (اشهاد)." Al-ʿAdawī.

3. Or three dirhams equivalent to about eighteenpence. By custom, however, a substantial dower (for example of ten pounds or upwards) is enforced in most Muslim countries at the present day.

﴿ الجبر ﴾

٤. و للأَبِ انكاحُ ابنتهِ البكْرِ بغيرِ اذنها و ان بَلَغَتْ و ان شاءَ شاوَرَها

٥. و أما غيرُ الأَب فى البكْر (وَصىٌّ أَو غيرهُ) فَلا يُزوِّجُها حتى تبلُغَ و تأْذَنَ

٦. و إِذْنُها صُماتُها

٧. و لا يُزوِّجُ الثيبَ أَبٌ و لا غيرُه الا برضاها

٨. و تأْذَنَ بالقول

٩. ولا تُنْكَحُ المرأَةُ الا باذن وَليّها أَوْ ذى الرَّأْى من أَهْلِها كالرَّجُل من عَشيرتها أَو السُّلْطان

١٠. وقد اُختلف فى الدَّنيَّة أَنْ تُوَلّىَ أَجنَبياً

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5. Compare, however, with regard to a waṣī's powers, the more explicit statement made in rule 14.

7. A thayyib means a woman who has in fact lost her virginity lawfully in wedlock; or who is by a conclusive presumption of the law held to have done so, on the ground that she has resided in her husband's house twelve months, she being then above puberty. Defloration by illicit relations will not render a woman thayyib.

9b. Commentators are not agreed as to the meaning of ذى الرأى. According to al-ʿAdawī it means one possessing the qualifications requisite for walīship.

RIGHT OF CONSTRAINT.

4. A father may give his virgin daughter in marriage without her consent, even if she has attained puberty; but if he pleases, he may consult her.

5. Persons other than the father, (such as a testamentary guardian etc.), may not give a virgin in marriage until she attains puberty and gives her consent.

6. A virgin's consent is silence.

7. Neither the father or any other can marry a woman who is not a virgin (thayyib) without her consent.

8. A woman (thayyib) must give her consent by speech.

9. A woman cannot marry without the consent (a) of her matrimonial guardian; or (b) responsible member of her family, like a man of her tribe; or (c) of the governing power.

10. There is difference of opinion whether a mean woman may authorise a stranger to act as her matrimonial guardian.

9*c*. The Cadi, as representing the governing power, may sanction marriages: (1) where it is necessary to marry an orphan between ten and fifteen years of age, in order to secure her honour, property etc. (2) where a woman has no special walī to represent her; (3) where her special walī is in a distant country and has settled there; (4) where a father maliciously refuses to marry his daughter, etc.

10. A *mean woman* means one who is not much sought after, e.g. being of humble birth, poor, a freedwoman, etc. A stranger may, when authorised by her, act as her walī even though she has a special walī; but not where that special walī is mujbir, i. e. is a father or waṣī entitled to employ constraint.

١١. والابنُ أَولَى من الاَبِ والاَبُ أولَى من الاَخِ و من قَرُبَ من العَصَبة أحقُّ

١٢. و ان زَوَّجَها البَعيدُ مضَى ذلك

١٣. وللوَصيّ أن يُزوجَ الطّفلَ فى ولايته

١٤. ولا يُزوّجُ الصغيرَةَ الا أن يأمُرَهُ الاَبُ بانكاحها

١٥. وليسَ ذَوو الاَرحام منَ الاولياء والاَولياءُ من العَصَبة

خِطبة على خِطبة

١٦. ولا يَخطُبُ أحدٌ على خِطْبةِ أخيه ولا يَسُومُ على سَوْمه

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11. More fully detailed, the order of priority is as follows: 1st, the woman's own son, if she has one; 2nd, her father; 3rd, her brother: 4th, her brother's son; 5th, her father's father; 6th, her father's brother; 7th, the son of this last etc. Brothers, nephews, uncles, etc. of the full blood are preferred over relatives of the half blood standing in the same degree. Where the woman is herself under the guardianship of her father, the latter will exclude her son, in lieu of being excluded by him. — The order of affinity among heirs is somewhat different, the grandfather and brother being grouped together as forming the third class of agnates: see below, rule 294—299 and Appendix O.

12. The reference is to agnates more remote in rank: for example, the case of a woman being married by an uncle instead of a brother. Such a marriage is not lawful to begin with; but if the bridegroom be a suitable match for the woman it will stand: otherwise the special walī may annul the marriage.

13. The meaning is that the waṣī may employ constraint when he has been so authorised by the father, and the match is an advantageous one for the boy.

14. The waṣī can only exercise constraint over his female

11. With regard to precedence among matrimonial guardians, a son comes before a father; and a father before a brother; and generally a nearer agnate before one more remote.

12. But if a more remote agnate give the woman in marriage, the marriage will stand.

13. A testamentary guardian may give in marriage any boy who is under his guardianship.

14. He cannot marry a girl under puberty, unless where the father instructs him with regard to her marriage.

15. Maternal relations are not to be regarded as matrimonial guardians, but only relations through males.

COMPETITION AMONG SUITORS.

16. A man shall not demand in marriage a woman previously sought by another; (just as he may not outbid the bid offered by another).

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ward when the father has given him instructions to that effect, or has authorised him to marry her, or expressly made his walāyah to extend over the person of the ward, or has designated the husband. Otherwise he must wait till the ward attains puberty and must then obtain her consent to the marriage.

15. Maternal relations admitted to the position of heirs, (e.g. brothers uterine), are excluded from the walāyah, equally with those who receive no share in the inheritance, (e.g. maternal uncles).

16. His doing so is forbidden (حرام). The second marriage will fall to be annulled before consummation, by repudiation, without dower, even though the first suitor consents to waive his claim. The prohibition, however will not arise where the first suitor is a man of immoral character. — The latter part of the text „just as he may not etc." is also a traditional utterance of the Prophet; the rule represents its application to the case of marriage.

١٧. وذلك اذا رَكِنا و تَقَارَبا

الانكحة الباطلة

١٨. ولا يجوزُ نكاحُ الشِّغَارِ وهو البُضْعُ بالبُضْعِ

١٩. ولا نكاحٌ بغيرِ صَدَاقٍ

٢٠. ولا نكاحُ المُتْعةِ وهو النكاحُ إلى أجَلٍ

٢١. ولا النكاحُ فى العدّةِ

٢٢. ولا ما جَرَّ إلى غَرَرٍ فى عَقْدٍ أو صَدَاقٍ

٢٣. ولا بما لا يجُوز بيْعه

٢٤. وما فَسَدَ من النكاح لصَدَاقه فُسِخَ قَبْلَ البناء فانْ دَخَل بها مَضَى وكان فيه صَدَاقُ المثل

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17. On this point the jurists differ; but the statement of Mālik in the Muwaṯṯa' is in favour of the view stated here.

18. Suppose, for example, that one man says to another: "Give me your daughter in marriage without a dower, and I will give you my daughter without dower": this would be a typical instance of a marriage of privation. The result, were such a form of marriage allowed, would be to reverse the principle that dower is absolutely essential to the constitution of a marriage: see below, rule 19 and note.

19. By a marriage without a dower is meant a marriage in which the parties come to an understanding that no dower shall be paid. It will fall to be annulled without dower on discovery before consummation; but after consummation will be upheld with the customary dower. Cf. rule 24 and note.

20. It is of the essence of marriage that a life-long union should be intended: where therefore both parties agree that

17. This applies where the first suitor's demand has been favourably received, and the parties have come to terms.

ILLEGAL MARRIAGES.

18. The law forbids (1) a marriage of privation; this occurs where one bride's person is made another bride's dower:

19. (2) a marriage without dower:

20. (3) an usufructuary marriage, i. e. to endure till a certain date:

21. (4) a marriage during the woman's retreat:

22. (5) anything which involves risk in the contract or in the dower:

23. (6) a marriage with a dower consisting of anything the sale of which would be unlawful.

24. A marriage invalid by reason of the dower falls to be annulled before consummation; after consummation, it will stand and the wife will be entitled to the customary dower.

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it shall endure only for a certain period whether short or long, the marriage is invalid. The fact that the husband may in his own mind have intended to terminate it after a time, will not render the marriage invalid, so long as he has not communicated this intention to the wife.

21. The objection to marriage during ʿiddah is the risk of *commixtio sanguinis*: where intercourse has taken place the parties will be for ever debarred from marrying one another. Cf. rule 57 and note.

22. For example, marriage at the option of one of the spouses, or of some third party: or subject to a condition that, if the dower is not paid by a certain date, the marriage shall be void; or of a dower consisting of a runaway camel.

23. Such as things sacrimonially impure, e. g. pork, wine etc.

24. Customary dower is such a dower as would normally be given for a bride such as the one in question, regard being had to her rank, wealth, beauty, age, virginity, widowhood etc. Cf. rule 19 and note.

٢٥. وما فَسدَ من النكاح لعَقْده وفُسِخَ بعدَ البناء ففيه المُسَمَّى

٢٦. وتَقعُ به الحُرمةُ كما تَقعُ بالنكاح الصحيح

٢٧. ولكن لا تحلُّ به المطلَّقةُ ثلاثًا

٢٨. ولا يُحصَّنُ به الزوجان

المحرمات

٢٩. وحَرَّمَ اللّٰه سُبْحانَه من النساء سَبْعًا بالقَرابة وسَبعًا بالرَّضاع والصِّهْر

٣٠. فقال عزَّ و جلَّ «حُرِّمَتْ عليكم أمَّهاتُكم وبناتُكم وأخواتُكم وعَمَّاتُكم وخالاتُكم وبناتُ الأخِ وبناتُ الأُخْتِ» فهؤلاء من القَرابة

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25. Examples of marriage invalid in this manner are (a) a marriage contracted by a woman without a walī; (b) marriage during ʿiddah; (c) a marriage while one of the parties was on pilgrimage; (d) a marriage for a period. No dower will be payable on annulment before consummation.

26. Invalid marriages are of two kinds: (a) those which are universally regarded as invalid; (b) those which some jurists uphold as valid. Where there is a *consensus* of opinion among the jurists as to its invalidity, the husband on consummation will be debarred from marrying any of the ascendants or descendants of the wife; the wife also will be debarred from marrying any of the ascendants or descendants of the husband; but if there is no binaʾ, there is no prohibition. On the other hand, if there is disagreement among the jurists as to whether such a marriage be invalid or not, the contract in itself will raise a prohibition against marriage between the husband and his wife's mother; but a similar prohibition against marriage with her daughters will arise only on consummation.

25. A marriage invalid on account of some flaw in the contract, is to be annulled even after consummation; and the wife will be entitled to the dower stipulated.

26. A prohibition against marriage within the forbidden degrees will be established thereby, just as by a valid marriage.

27. But a marriage of this nature will not suffice to legalise for her first husband a woman trebly divorced;

28. Nor will it render lawful the co-habitation of the spouses.

FORBIDDEN DEGREES.

29. God forbids marriage (a) with seven classes of females on the ground of consanguinity, (b) with seven on the grounds of fosterage and affinity.

30. It is laid down in the K̲ur-ān — "Forbidden for you are your mothers, daughters, sisters, maternal aunts, paternal aunts, brother's daughters, sister's daughters": these are prohibited on the ground of consanguinity.

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27. To check capricious repudiation the Prophet made it illegal for a man to remarry a wife whom he had repudiated, until after she had contracted and consummated a new marriage and been divorced by the new husband. As mentioned here in the rule, the second marriage must be a valid one, otherwise it will have no effect in the direction of legalising re-marriage with the first husband. Cf. rule 59 and note; and rule 65.

29. It will be understood that by consanguinity is meant natural relationship in blood; while affinity is the term applied to connections by marriage.

30. Sūrah IV, verse 27.

٣١. و اللّواتى من الرّضاع والصّهر قوله تعالىَ «و أمّهاتكم اللّاتى أرضعنكم وأخواتكم من الرّضاعة وأمّهاتُ نسائكم و ربائبكم اللّاتى فى حُجُوركم منْ نسائكم اللّاتى دَخَلتُم بهنّ فانْ لم تكونوا دَخَلتم بهنّ فلا جُناحَ عليكم وحَلائلُ أبنائكم الذينَ منْ أصْلاَبكم

٣٢. وأنْ تجمَعُوا بين الأُختين الا ما قد سَلَف»

٣٣. وقال تَعالَى «ولا تنكحوا ما نَكَحَ آباؤكم من النساء»

٣٤. وحَرَّمَ النبىُّ صلى اللّه عليه وسلم بالرَّضاع ما يَحْرُمُ من النَّسَبْ

٣٥. و نَهَى أن تُنكَحَ المرأةُ على عَمَّتها أو خالَتها

٣٦. فمن نكَحَ امرأةً حَرُمَتْ بالعَقْد دُونَ أن تُمَسَّ على آبائه و أبنائه و حَرُمَتْ عليه أُمَّهاتُها

٣٧. ولا تَحرُمُ عليه بنَاتُها حتى يَدخُلَ بالأُمّ أو يَتلذَّذَ بها بنكاحٍ أوبشُبْهةٍ من نكاحٍ

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31. Those prohibited by fosterage are: 1st, mothers, and 2nd. sisters of the foster-child. Those prohibited by affinity are, 1st, the wife's mother; 2nd, the wife's daughter; 3rd, the father's wife; 4th, the son's wife: and to these four cases falls to be added as a sort of fifth case — 5th, marriage with two sisters at the same time. See below, rule 32. The words "that are in your laps", have no restrictive significance: marriage with any step-daughter is unlawful in case the marriage with the mother has been consummated. Marriage with a mother-in-law is construed as unlawful by the mere

31. As to those forbidden on the ground of fosterage or affinity, the passage in the Ḵur-ān is: "Your mothers who suckled you, and your foster-sisters, and the mothers of your wives, step-daughters that are in your laps (i. e. in your charge) through wives of yours to whom you have come in; but if you have not come in to them, then there is no sin upon you: and the wives of your sons whom you have begotten:

32. And you shall not bring together (in marriage) two sisters, except what has occurred in the past."

33. Elsewhere the Ḵur-ān says: "Do not marry women whom your fathers have married."

34. Also the Prophet has forbidden on the ground of fosterage any woman who would be forbidden on the ground of consanguinity:

35. Or the bringing together in marriage of a woman and her paternal or maternal aunt.

36. On a man marrying a woman, she becomes prohibited for his ascendants and descendants, by virtue of the contract, without consummation: and her mother, grandmother etc., become unlawful for the husband:

37. But her daughters are not prohibited for him, unless the marriage has been consummated, or dalliance has taken place in wedlock or on the supposition thereof.

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fact of the contract with her daughter: cf. above, rule 26, note; and below, rule 36.

32. This prohibition is merely temporary: on repudiating one sister, the man's marriage to the other will be legalised. The rule applies to foster-sisters equally with natural sisters.

35. Ḵhalīl lays it down generally: it is unlawful to bring together two women so related to one another that, were one of them supposed to be a male, marriage between them would be unlawful.

36. Cf. above, notes to rules 26 and 31.

37. شبهة النكاح as here employed means a case of mis-

٣٨. ولا يَحرمُ بالزنا حلالٌ

وطء الكوافر

٣٩. وحرّم اللهُ سُبْحانه وَطْءَ الكَوافر ممّنْ ليسَ من أهل الكتاب ويَحلُّ وَطْءُ الكتابيّات بالنّكاح

الانكحة الجائزة

٤٠. و له أن يَتزوّجَ بنتَ امرأة أبيه من رَجُل غيره وتتزوّجُ المرأةُ ابنَ زوجة أبيها من رَجُل غيره

تعدد الزوجات

٤١. ويجوزُ للحُرّ نكاحُ أربعِ حرائرَ مُسلماتٍ أو كتابيّاتٍ ولْيَعْدلْ بينَ نسائه

ما يجب على الزوج للزوجة

٤٢. وعليه النفقةُ والسُّكْنَى بقَدرِ وُجْده

٤٣. ولا نَفقةَ للزوجة حتى يَدخُلَ بها أو يُدْعَى الى الدُّخول وهي ممن يُوطَأُ مثْلُها

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take, a man having intercourse with another woman on the supposition that she is his wife.

39. Such a marriage is, however, censurable (مكروه). A Scriptural woman means a Jewess or a Christian: the Prophet

38. Illicit relations will not raise a prohibition against marriage with women whom it would otherwise be lawful for a man to marry.

MIXED MARRIAGES.

39. God has forbidden intercourse with unbelieving women: but marriage with a scriptural woman is permitted.

NON-FORBIDDEN UNIONS.

40. A man may marry a daughter whom his father's wife has borne to another man; and a woman may marry a son whom her father's wife has borne to another man.

POLYGAMY.

41. It is lawful for a man to marry four free Muslim or scriptural women: but let him observe justice among his wives.

HUSBAND'S DUTIES TOWARDS WIVES.

42. He must give them maintenance and lodging according to his means;

43. But a wife's right to maintenance will only commence from consummation, or such time as the husband has been invited to consummate the marriage, the wife also being capable of intercourse.

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recognised both Jews and Christians as standing on a different footing from idolators, in respect that they believed in inspired writings.

41. There is a hadīth: "If a man has two wives, and does not observe justice between them, he will appear at the last day shorn of half himself."

﴿ نكاح التفويض ﴾

۴۴. و نكاحُ التفويضِ جائزٌ و هو أن يَعْقداهُ ولا يَذكُرانِ صَداقًا

۴۵. ثم لا يَدخُلُ بها حتى يَفْرِضَ لها

۴۶. فان فَرَض لها صداقَ المِثْل لزِمَها

۴۷. وان كان أقلَّ فهى مُخَيَّرةٌ

۴۸. فان كرِهَتْه فُرِّق بينهما الا أن يُرْضِيَها أو يَفْرِضَ لها صَداقَ مِثْلها فيَلزمُها

﴿ الرِدّة ﴾

۴۹. واذا ارتدَّ أحدُ الزوجين انفسخَ النكاحُ بطلاق وقد قيلَ بغير طلاق

﴿ الاسلام ﴾

۵۰. واذا أسلَم الكافِران ثَبَتا على نكاحِهما

۵۱. و انْ أسلَم أحدُهما فذلك فسخٌ بغير طلاق

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44. Contrast with a marriage by delegation, which is lawful, the unlawful case of the parties, not merely leaving the dower unfixed, but positively agreeing that none shall be paid: see above, rule 19, note.

50. Islam validates their previous marriage so long as there is no impediment in the way, such as relation within the forbidden degrees of consanguinity or fosterage.

MARRIAGE BY DELEGATION.

44. A marriage by delegation is lawful: this occurs where the parties enter into the contract without mentioning the dower.

45. The husband is not entitled to consummate the marriage until he has assigned the woman a dower.

46. If he appoints her the customary dower, the marriage is binding on her.

47. If the dower which he names is less than the customary amount, she has the option of revoking the marriage.

48. If she dislikes the dower, they are to be separated, unless the husband induces her to acquiesce, or assigns her the customary dower; in which case the marriage binds her.

APOSTASY.

49. Where one of the spouses apostatises, the marriage is annulled by repudiation; or, as other authorities maintain, without repudiation.

CONVERSION.

50. When two unbelieving spouses are converted to Islam, their marriage is maintained.

51. If one only embraces Islam, their marriage is annulled without repudiation.

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51. The supposition here is either (a) that the husband, who is converted, has a pagan, not a scriptural, woman to wife; or (b) that the wife is the convert, in which case it is immaterial whether the husband be a scriptural man or a pagan.

٥٢. فان أسلمَتْ هى كان أحقّ بها ان أَسلَم فى العدّة

٥٣. وان أسلَم هو وكانت كتابيةً ثَبتَ عليها

٥٤. فان كانت مجُوسيةً فأسلمتْ بعدَه مكانَها كانا زوجَين وان تأخرّ ذلك فقد بانَتْ منه

٥٥. واذا أسلَم مُشرِكٌ وعندَه أكثرُ من أربع فليختَرْ أربعاً ويفارقْ باقيَهُنّ

تأبيد التحريم

٥٦. ومَن لاعَنَ زوجتَه لم تحلّ له أبداً

٥٧. وكذلك الذى يَتزوّجُ المرأةَ فى عدتها ويَطَوُها فى عدّتها

المحظورات

٥٨. ولا تعقدُ امرأةٌ ولا مَن على غيرِ دينِ الاسلامِ نكاحَ امرأة

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54. Majūsīyah, which we have here translated "pagan", means a woman who is neither a Jewess nor a Christian (nor perhaps a Zoroastrian), but properly a Magian, or by extension an idolatress or follower of some religion other than those indicated above.

55. The selection must be made from among such of his wives as are permitted in Islam.

56. The supposition here is that both spouses take the oath of imprecation mentioned below in rule 117: otherwise if only the husband takes the oath and the wife draws back, there is no annulment and no perpetual impediment to matrimony.

52. If the woman is converted, the husband is the person best entitled to her, in case he also embraces the true faith during her retreat.

53. If the man is converted, while the woman remains a scriptural woman, his right to his wife continues.

54. If she was a pagan, and enters Islam immediately after him, they remain husband and wife: if, however, her conversion be delayed, she becomes separated from her husband.

55. When a polytheist with more than four wives enters Islam, let him choose four and separate from the rest.

PERPETUAL IMPEDIMENTS.

56. A perpetual prohibition against marriage arises: (1) When a man prosecutes an action of imprecation against his wife;

57. (2) When a man marries a woman during her retreat, and intercourse takes place during the retreat.

THINGS FORBIDDEN.

58. One woman may not be given in marriage by another woman, nor by a non-Muslim man.

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57. Even though the intercourse be after ʿiddah, the impediment will still arise in case the marriage has been contracted during ʿiddah. Cf. rule 21 and note.

58. This is a hadīth: "A woman may not marry another woman." A woman may be appointed a testamentary guardian, and as such will be in a position to exercise constraint over her wards, but for the application of this rule in the case of such of them as are females. — It is a further condition of walāyah that the walī, besides being a man, must be a Muslim.

٥٩. ولا يَجوزُ أن يَتزوّجَ الرجلُ امرأةً ليُحلّها لمن طلّقها ثلاثا ولا يُحلّها ذلك

﴿ نكاح المُحرم ﴾

٦٠. ولا يجوز نكاحُ المُحْرِمِ لنفْسه ولا يَعقدُ نكاحاً لغيره

﴿ نكاح المريض ﴾

٦١. ولا يَجُوزُ نكاحُ المريض ويُفسَخُ

٦٢. وان بَنَى بها فلها الصَّداقُ في الثلُث مُبَدّاً

٦٣. ولا ميراثَ لها

٦٤. ولو طَلّقَ المريضُ امرأتَه لزِمَه ذلك وكان لها الميراثُ منه ان ماتَ في مَرَضه ذلك

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59. There is a hadīth: "He said, 'Shall I not inform you "of the borrowed goat?' They said, 'Yes, O messenger of God.' "He said, 'That is the muhallil!' Then he added, 'May God "curse the muhallil and the man who employs him.'" The muhallil means a man who marries a woman irrevocably repudiated by her husband, for the express purpose of rendering lawful her re-marriage with the latter. Cf. above, rule 27; and below, rule 65..

60. A marriage so contracted is to be annulled even after consummation.

61. The Kur-ān having fixed the shares to be received by heirs of the various kinds, any contrivance by which that allocation can be defeated must be unlawful. One contrivance of this sort would be for a man suffering from a mortal disease, or one likely to prove such, out of a desire to benefit

59. It is not permissible for a man to marry a woman with intent to render her lawful for another man by whom she has been irrevocably repudiated; and such a marriage will not render her lawful for the former husband.

MARRIAGE ON PILGRIMAGE.

60. It is not lawful for a man who has donned the pilgrim's garb to marry, or to contract marriage on behalf of another.

MARRIAGE DURING ILLNESS.

61. A marriage contracted by a man during sickness is unlawful and falls to be annulled.

62. If consummation has taken place, the wife will be entitled to dower out of the disposable third in preference to his legatees.

63. But she will have no right of inheritance.

64. If a sick man divorces his wife he is bound thereby; but she is entitled to share in his succession, if he dies of the same complaint.

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a certain woman, or perhaps intending to injure his other heirs, to marry a woman, so that upon his death she would become entitled to a fourth or an eighth of his succession: hence the general prohibition against marriages during any dangerous illness. They are to be annulled whether before or after consummation. If, however the husband recovers, and the marriage is not discovered until after his recovery, it will be allowed to stand.

62. A man may not by will dispose of more than a third of his estate; this is the meaning of the *disposable third*.

64. The Prophet forbade the introduction of an heir into an inheritance, and equally therewith the exclusion of an heir naturally entitled: repudiation during a dangerous illness therefore, is equally objectionable with marriage during a dangerous illness, as being a means of interfering with the divinely instituted scheme of succession.

﴿ الطلاق ﴾

٦٥. و مَن طَلَّقَ امرأتَه ثلاثًا لم تَحِلّ له حتى تَنكِحَ زوجًا غيرَه

٦٦. وطلاقُ الثلاث فى كلمةٍ واحدةٍ بدعةٌ ويَلزمُ ان وقَعَ

٦٧. وطلاقُ السُنَّة مُباحٌ

٦٨. وهو أن يُطَلِّقَها فى طُهْر لم يَقْرَبْها فيه طَلقةً ثم لا يُتْبِعُها طلاقًا حتى تَنْقضىَ العدَّةُ

٦٩. وله الرجعةُ فى التى تحيضُ ما لم تَدخُلْ فى الحَيضة الثالثة

٧٠. فان كانت ممن لم تحضْ أو ممن قد يئسَتْ من المَحيض طلَّقها متى شاء

٧١. وكذلك الحاملُ

٧٢. وتُرتَجَعُ الحاملُ ما لم تَضَعْ

٧٣. والمُعتدّةُ بالشهور ما لم تَنقَض العدَّةُ

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66. "That is *heretical* (بدعة) which the law-giver regards as censurable." Al-Sharnūbī.

67. There is a ḥadīth: "Of all things permitted, repudiation is the most hateful to God."

68. Neglect of any of the four conditions mentioned in the rule will make the repudiation heretical.

REPUDIATION.

65. A man who has repudiated his wife by a triple repudiation, may not resume cohabitation with her, until she has married another husband.

66. It is heretical for a man to pronounce a triple repudiation in a single utterance; but, if it be done, it will bind the husband.

67. Repudiation in accordance with tradition is permitted.

68. A repudiation is in accordance with tradition when (a) the man repudiates his wife during a period of purity intervening between her menstrual courses; (b) when he has not approached her during that period; (c) it must be a single repudiation, and (d) one repudiation ought not to be followed by another before the expiry of the retreat resulting from the first.

69. The husband may take back a wife who menstruates so long as she has not entered upon her third monthly course.

70. If she is not menstruating, or has changed her way of life, he may repudiate her at any time when he pleases.

71. The rule is the same with regard to a pregnant woman.

72. She can be taken back by her husband at any time before childbirth.

73. A woman observing retreat by months can be taken back at any time before the retreat expires.

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69. The recall may be made by formal declaration, or inferable facts and circumstances, such as the resumption of intercourse.

٧٤. والأقراءُ هي الأطهارُ

٧٥. ويُنْهَى أن يُطَلِّق في الحيض فان طَلَّق لَزِمَه و يُجْبَر على الرجعة ما لم تنقض العدّةُ

٧٦. والتى لم يَدخُلْ بها يُطَلِّقها متى شاء

٧٧. والواحدةُ تُبينُها

٧٨. والثلاثُ تُحرِّمُها الّا بَعْدَ زوجٍ

٧٩. ومَن قال لزوجته أنتِ طالقٌ فهى واحدةٌ حتى ينوىَ أكثرَ من ذلك

الخلع

٨٠. والخُلْعُ طلقةٌ لا رجعةَ فيها (وان لم يُسمّ طَلاقًا) اذا أعطَتْه شيئًا فتَخلعها به من نَفْسه

صِيَغ الطلاق

٨١. ومَن قال لزوجته أنت طالقٌ البتّةَ فهى ثلاثٌ دخَلَ بها أو لم يَدخُلْ

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74. Sūrah, 2, 228.

75. His doing so is ḥarām, forbidden, not merely heretical.

77. The meaning is that the separation will continue unless the husband takes the woman back. Re-marriage, however,

74. The word k̲arʾ (occurring in the K̲ur-ān) has the meaning of the interval between two courses.

75. It is forbidden for a man to repudiate his wife during her courses; if he does so, it binds him; but he will be constrained to take her back so long as the retreat has not expired.

76. As for a wife with whom he has not cohabited, he may repudiate her whenever he pleases.

77. A single repudiation separates the woman from the man.

78. A triple repudiation makes relations between them unlawful, except after her marriage to another husband.

79. Whoever says to his wife, "You are repudiated", pronounces a single repudiation, unless he intended more than that.

RELEASE.

80. Release is an irrevocable repudiation, (even though the word "repudiation" may not have been employed), in which the wife gives a husband something in consideration of which he relinquishes his right over her.

FORMULAS OF REPUDIATION.

81. When a man says to his wife, "You are repudiated finally", this is a triple repudiation, whether consummation has occurred or not.

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may take place without the necessity of marriage to another husband intervening, contrary to the principle governing a triple repudiation: see below, rule 78 and note.

78. Cf. above, rules 27, 59, 65.

٨٢. وان قال بَرِيّةٌ أو خَلِيّةٌ أو حَرامٌ أو حَبْلُكِ على غارِبِكِ فهى ثلاثٌ فى التى دخَلَ بها

٨٣. ويُنَوّى فى التى لم يَدخُلْ بها

حقوق المُطلّقة

٨٤. والمطلّقةُ قبلَ البناء لها نصفُ الصدَاق

٨٥. الا أن تَعفُوَ عنه هى ان كانت ثَيِّباً

٨٦. وان كانت بكرًا فذلك الى أبيها

٨٧. و مَن طلّقَ فينبغى له أن يُمَتّعَ ولا يُجبَرُ

٨٨. والتى (ا) لم يَدخُلْ بها وقد فَرَضَ لها فلا مُتْعَةَ لها (ب) ولا للمختَلعة

حقوق التى مات عنها الزوج

٨٩. وان ماتَ عن التى لم يَفْرِضْ لها ولم يَبْنِ بها فلها الميراثُ ولا صداقَ لها

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82. The interpretation put upon these expressions by the jurists, it must be remembered, is based upon the customary employment of them by Arabs. Among non-Arabic-speaking Muslims, they are of force only so far as susceptible of analogical extension.

82. If the man says, "You are free", or "You are single", or "You are prohibited", or "The rope is on your back", this is regarded as a triple divorce where consummation has occurred.

83. In the case of a wife with whom he has not cohabited regard is to be had to the husband's intention.

RIGHTS OF REPUDIATED WIVES.

84. A woman repudiated before consummation is entitled to half the dower.

85. A woman who has been previously married may, however, waive her claim.

86. If the bride be a virgin, the right to waive her claim rests with her father.

87. When a man repudiates a wife, he ought to give her something by way of compensation; he is not, however, compelled to do so.

88. There is no occasion for compensation where (a) consummation has not occurred, and a dower has been assigned to the woman; nor (b) in the case of a release.

RIGHTS OF WIVES ON DEATH OF HUSBAND.

89. Where the husband dies without having assigned a dower to his wife, and without having cohabited with her, she will be entitled to a share in his inheritance, but not to dower.

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84. Ḳur-ān, ٢, 238.

88. This rule must not be confounded with rule 20, forbidding marriages for a fixed period, where the same word متعة is employed in a different sense.

٩٠. ولو دخل بها كان لها صَداقُ المثْل ان لم تكن رضيَتْ بشيءٍ معلوم

خيار الفسخ

٩١. وتُرَدُّ المرأةُ من الجُنونِ والجُذامِ والبَرَصِ وداءِ الفَرْجِ

٩٢. فان دَخل بها ولم يَعلم وَدَّى صداقها ورجع به على أبيها وكذلك ان زَوَّجها أَخُوها

٩٣. وان زَوَّجها وليٌّ ليس بقريبِ القرابةِ فلا شيءَ عليه ولا يكونُ لها الّا رُبْعُ دينار

٩٤. ويؤخَّرُ المعتَرِض سَنةً فان وطئَ والّا فُرِّق بينهما ان شاءتْ

المفقود

٩٥. والمَفقودُ يُضْرَبُ له أَجَلُ أَربعُ سنينَ من يوم تَرْفَعُ ذلك وينتهي الكَشْفُ عنه

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90. "Something definite" (شيء معلوم) means something less than the customary dower.

91. But there can be no rejection for diseases supervening on marriages. — It is necessary to observe the important practical difference between rejection and repudiation: in the former case nothing is due by the rejecting husband; in the other, he must pay half or the whole of the dower. Again, the right of rejection, (unlike repudiation) may be exercised by the woman as well as the man.

93. The principle of the different rule applied in this case from that governing the one which precedes, is that a distant relative (for example, a cousin) cannot be presumed to have

90. If consummation has occurred, the wife is entitled to the customary dower, unless she had agreed to something definite.

GROUNDS OF OPTION.

91. A woman may be rejected on account of insanity, elephantiasis, white leprosy, and disease of the genital organs.

92. If the man consummates the marriage not being aware of the defect, he must pay the dower, but may recover it from her father or from her brother, in case it is a brother who has married her.

93. But if she is given in marriage by a walī who is not one of her near relations, the husband can recover nothing from the walī; and the woman is entitled only to a fourth of a dīnār.

94. Where the bridegroom is impotent, he is allowed a year's delay: if he consummates the marriage, well and good; if not, the woman is entitled to a separation, if she pleases.

HUSBAND MISSING.

95. Where a husband is missing, a delay of four years is allowed dating from the day when the matter is brought before the court, and the termination of the search for him.

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known of the defect; whereas it is almost impossible to conceive that a father or a brother should have been ignorant of its existence. The woman must return the dower to her husband except a quarter of a dīnār, which she is allowed to retain as "God's due" (حق الله).

94. The woman will be entitled to the half, or the whole dower, according as the separation takes place during or after the expiry of the year.

٩٦. ثم تَعتَدُّ كعدّة المَيّت ثم تتزوّجُ ان شاءت

٩٧. ولا يُورَثُ مالُه حتى يأتىَ عليه من الزمان ما لا يَعيشُ الى مثْله

﴿ العدّة ﴾

٩٨. ولا تُخْطَبُ المرأةُ فى عدّتها ولا بأسَ بالتّعْريض بالقول المَعروف

﴿ الاقامة عند الزوجة ﴾

٩٩. ومَن نكَح بكْراً فله أن يُقيمَ عندَها سَبْعاً دونَ سائر نسائه وفى الثّيّب ثلاثةَ أيام

﴿ طلاق الصبى وغيره ﴾

١٠٠. ولا طلاقَ لصبىّ

١٠١. والمُمَلَّكةُ والمُخيَّرةُ لهما أنْ يَقْضيا ما دامَتا فى المَجلس

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97. Seventy years is according to the prevailing view regarded as the limit of human life for the purposes of this rule. Circumstances, however, such as the recurrence of a terrible epidemic in the place where the deceased was last heard of, are also to be taken into account.

98. For example it is lawful to say, "I desire you", or "I love you". Sending presents is also permissible; but the man must not afford the woman actual maintenance.

96. The woman shall observe a retreat of the same duration as after a decease; thereafter she may marry if she pleases.

97. His succession will not fall to be distributed, until the expiry of such a period as would transcend the possible limits of his life.

RETREAT.

98. A woman may not be sought in marriage during her ʿiddah; but there is no harm in suggestions made by complimentary speeches.

RESIDENCE WITH BRIDES.

99. When a man marries a virgin, he may stay with her for seven days, without (having to compensate) his other wives. In the case of a non-virgin, he may remain three days.

REPUDIATION BY A MINOR ETC.

100. A husband who is under age cannot repudiate his wife.

101. (a) A wife to whom the husband has given the right of repudiating herself, or (b) one to whom he has given the option of divorce, may exercise the right so long as the meeting of the parties is not broken up.

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100. But his guardian may do so on his behalf, when it is to his advantage.

101. The first case here (a) is that of al-mumallakah, i.e. a woman to whom her husband has said, "I make you mistress of your own repudiation"; the latter (b) refers to al-mukhayyarah i.e. a woman to whom he has said "I give you the *choice* of your own repudiation".

١٠٢. وله أن يُنَاكِرَ المُمَلَّكَةَ خاصةً فيما فوقَ الواحدة

١٠٣. وليسَ لها في التخيير أن تقضيَ الا بالثلاث ثمّ لا نُكْرَةَ له فيها

﴿ الايلاء ﴾

١٠٤. وكُلّ حالف على تَرْكِ الوطْء أكثرَ منْ أربعةِ أشهُرٍ فهو مُولٍ

١٠٥. و لا يَقعُ عليه الطلاقُ الا بعدَ أجَلِ الايلاء (وهو أربعةُ أشهُرٍ) حتى يُوقفَه السلطانُ

﴿ الظهار ﴾

١٠٦. ومَن تَظاهَرَ من امرأتهِ فلا يطؤُها حتى يُكَفِّرَ

١٠٧. بعتْقِ رَقَبةٍ مؤمنَةٍ سليمةٍ من العُيوبِ ليس فيها شِرْكٌ ولا طَرَفٌ من حُرّيةٍ

١٠٨. فان لم يَجِدْ صام شهرين متتابعَين

١٠٩. فان لم يَستطِعْ أطعَمَ ستينَ مِسكيناً مُدَّين لكلِّ مِسكينٍ

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105. The judge will give him the choice of divorce or returning to his wife.

106. An example of an injurious assimilation is where a man says to his wife, "You are to me like the back of my mother", or "of my sister", or any relative within the forbidden degrees: the implication being an intention to discontinue marital relations. Kur-ān **58**, 1—5.

102. The husband may in the case of a wife, made mistress of her own repudiation, deny (having intended) anything beyond a single divorce.

103. A woman given the choice of her own repudiation, can only pronounce a triple repudiation, nor the husband pretend that such was not his intention.

VOW OF CONTINENCE.

104. A vow of continence occurs when a man swears to discontinue relations with his wife for over four months.

105. He will not be divorced from her, until after expiry of the period allowed in the case of such vows, (which is four months), and a summons from the judge.

INJURIOUS ASSIMILATION.

106. Whoever addresses an injurious assimilation to his wife, must cease marital relations with her until he has made expiation.

107. (Expiation may be made) by freeing a Muslim slave, free from defect, in the ownership of whom no others are partners, and who is not already partly manumitted.

108. If the husband cannot accomplish this, he may fast for two months in succession;

109. Or, if he is unable to do that, he must feed sixty poor persons, giving them two *mudds* each.

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107. A slave allowed to redeem himself by payment of a certain sum will be in a position in which he may be regarded as partly manumitted.

109. *Mudd* is a dry measure equivalent to about nineteen ounces.

١١٠. ولا يطؤها فى ليل أو نهار حتى تَنقضىَ الكفّارةُ فان فَعلَ ذلك فلْيَتُبْ الى اللّه عزّ و جلّ

١١١. فان كان وطئه بعدَ أن فعَلَ بعضَ الكفّارة باطعام أو صَوْمٍ فلْيبتَدئْها

١١٢. ولا بأس بعتْقِ الأعْورِ فى الظِّهارِ ويُجْزِئُ الصغيرُ

١١٣. ومَن صلّى وصام أحَبُّ الينا

اللّعان

١١٤. واللّعانُ بين كُلّ زوجَين فى نَفْىِ حَمْل يُدَّعى قبلَه الاستبراءُ أو رؤيةِ الزنا كالمِروَدِ فى المُكْحُلَةِ

١١٥. واختُلفَ فى اللعان فى القَذْف

١١٦. واذا افترقا باللعان لم يتناكحا أبداً

١١٧. ويَبْدَأُ الزوجُ فيَلْتَعِنُ أربعَ شهادات باللّه ثمّ يُخَمِّسُ باللعنةِ ثم تَلتَعِنُ هى أربعاً أيضاً وتُخَمِّسُ بالغَضَبِ كما ذكرَ اللّه سبحانه وتعالى

115. When a man brings a charge of adultery against his wife, without averring ocular proof or repudiating her child, he is to be punished as for slander.

116. Cf. above, rule 56 note.

117. The proceedings must be solemnly conducted before

110. He ought not to have intercourse with his wife, by night or by day, until the expiation has been completed: but if he should have intercourse with her, let him ask pardon of God.

111. If the intercourse has taken place after he has begun the expiation, by feeding the poor or fasting, let him begin the expiation over again.

112. There is no objection to manumitting as expiation for an injurious assimilation, (a) an one-eyed slave, or (b) a slave below puberty.

113. But it is more commendable to pray and fast according to our view.

ACTION OF IMPRECATION.

114. An action of imprecation occurs (a) where a husband repudiates the child with which his wife is pregnant, on the ground of marital relations not having preceded; or (b) where he avers having found her *in flagrante delicto.*

115. There is difference of opinion with regard to allowing an action of imprecation merely upon grounds of suspicion.

116. After separation by action ot imprecation the parties may not re-marry.

117. The husband begins, declaring four times, "I testify by God etc.": then a fifth time, he pronounces an imprecation upon himself, in case he has spoken falsely. The wife then declares her innocence four times; and the fifth time, she invokes the wrath of God. Thus it is prescribed in the K̲ur-ān.

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an assembly of people, in the most sacred place in the town, i. e. in the Mosque.

﴿ الخلع ﴾

١١٨. وللمرأة أن تَفتَدِىَ من زوجها بصَداقها او أقلَّ أو أكثرَ

١١٩. اذا لم يكن عن ضَرَر بها فان كان عن ضرر بها رَجَعتْ بما أعطَتْه ولزِمَه الخُلْعُ

١٢٠. والخُلْعُ طَلقةٌ لا رجعةَ فيها الّا بنكاحٍ جديد برضاها

﴿ الرضاع ﴾

١٢١. وكلُّ ما وصَلَ الى جوف الرَّضيع فى الحَولَين من اللبَن فانه يُحَرِّمُ

١٢٢. وان مَصَّةً واحدةً

١٢٣. ولا يُحَرِّمُ ما أُرضِعَ بعدَ الحَولين الا ما قَرُبَ منهما كالشهرِ ونَحوِهِ وقيلَ والشهرَين

١٢٤. و لو فُصِلَ قبلَ الحَولين فِصالًا استَغنَى فيه بالطعام لم يُحَرِّمْ ما أُرضِعَ بعدَ ذلك

١٢٥. ويُحَرِّمُ بالوَجُورِ والسَّعُوطِ

RELEASE.

118. A wife may procure her release from her husband, by surrendering her dower, or more or less than her dower.

119. An exception is made where the release is arranged to the woman's detriment: in that case she receives back what she has surrendered and the release is nevertheless binding on the husband.

120. Release involves irrevocable repudiation, (precluding cohabitation); unless in case of a new marriage being entered into with the woman's consent.

FOSTERAGE.

121. An impediment from fosterage will arise when the woman's milk has found its way into the child's system, during the first two years of infancy.

122. A single act of suckling will suffice to create the impediment.

123. Suckling after expiry of the first two years of infancy will not have this effect, unless when it has taken place whithin a month, or as some authorities say, a couple of months, from the expiry of the two years.

124. Where a child has been weaned within the first two years of infancy, so as to have become independent of milk, and capable of subsisting on food, an act of suckling thereafter will not create the impediment.

125. Milk entering the child's system, either by the mouth or the nose, will create the impediment.

١٢٦ . ومن أرضعت صبيًا فبناتُ تلك المرأةِ وبناتُ فحلِها ما تقدّم أو تأخّر اخوةٌ له

١٢٧ . ولأخيه نكاحُ بناتها

باب فى العِدّة والنّفقة

١٢٨ . وعِدّةُ المطلّقةِ ثلاثةُ قروءٍ كانت مُسْلِمةً أو كتابيّةً

١٢٩ . فإن كانت ممن لم تحِضْ أو ممّن قد يئِسَتْ من المحيض فثلاثةُ أشهرٍ

١٣٠ . وعدّةُ الحاملِ فى وفاةٍ أو طلاقٍ وضعُ حَمْلِها كانت مُسْلِمةً أوكتابيةً

١٣١ . والمطلّقةُ التى لم يَدخُلْ بها لا عدّةَ عليها

١٣٢ . وعدّةُ المرأة من الوفاة أربعةُ أشهرٍ وعَشْرٌ كانت صغيرةً أوكبيرةً دخَلَ بها أو لم يَدخُلْ مُسْلِمةً كانت أوكتابيةً

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126. The prohibition extends to the foster-mother's children by other husbands, and to her present husband's children by other wives.

127. The brother may even marry the foster-mother herself; the prohibition applying only to the foster-child and his descendants and not to his ascendants or collaterals.

128. The reference is to repudiation after consummation contrast below, rule 131.

126. When a woman has suckled a male child, her daughters, and her husband's daughters, whether previously or subsequently begotten, are the sisters of the suckling.

127. But a brother of the suckling may marry the foster-mother's daughters.

CHAPTER II.

ON RETREAT, MAINTENANCE, AND PURIFICATION.

128. The period of retreat in the case of a woman repudiated by her husband, whether she be a Muslim or a scriptural woman, is three clear intervals between her menstrual periods.

129. If she have not begun or have ceased menstruating, the period will be three months.

130. Where the woman is pregnant, her retreat will continue until the birth of the child; and this whether the cause of the retreat be death of a husband or repudiation; also whether she be a Muslim or a scriptural woman.

131. A woman repudiated before consummation has not to undergo retreat.

132. On the death of her husband, a woman shall undergo a retreat of four months and ten days; whether she be minor or adult; whether consummation has taken place or not; and whether she be a Muslim or a scriptural woman.

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130. مسلمة has been substituted here and elsewhere in the text for حرّة in accordance with the principle which we have followed throughout, of omitting references to slavery as being without practical utility in British Colonies or Protectorates.

١٣٣. ما لم ترْتَبْ الكبيرةُ ذاتُ الحَيض بتأخيره عن وقْته فتقْعُدُ حتى تَذهبَ الرِّيبةُ

١٣٤. وأما التى لا تَحيضُ لِصِغَرٍ أوكِبَرٍ وقد بَنَى بها فلا تُنكَحُ فى الوَفاةِ الا بعدَ ثلاثةِ أشْهُرٍ

﴿ الاحداد ﴾

١٣٥. والْاحدادُ أنْ لا تَقْرَبَ المُعتدَّةُ من الوفاةِ شيئًا من الزينةِ بحُلىٍّ أوكُحْلٍ أو غيرِهِ وتَجتنبُ الصِّبغَ كُلّه إلا الأَسودَ وتجتنبُ الطِّيبَ كلَّه ولا تَختَضِبُ بحنّاء ولا تَقْرَبُ دُهناً مطَيَّباً ولا تَمتَشِطُ بما يَختَمِرُ فى رأسِها

١٣٦. و على المسلمةِ الصغيرةِ والكبيرةِ الْإحدادُ واختُلفَ فى الكتابيّةِ

١٣٧. وليس على المُطَلَّقةِ إحدادٌ

١٣٨. وتُجبَرُ الكتابيةُ على العدّةِ من المسْلمِ فى الوفاةِ والطَّلاقِ

﴿ السُّكْنَى ﴾

١٣٩. والسُّكْنَى لكُلِّ مطَلَّقةٍ مدخُول بها

133. But if, being of age and menstruating, she is in doubt (as to whether she is not pregnant) owing to a delay in the appearance of the *menses*, she shall continue the retreat until the removal of such doubt.

134. When the widow has not begun or has ceased to menstruate, she is debarred, in case her marriage has been consummated, from re-marrying until the expiry of three months.

MOURNING.

135. *Mourning* consists in this, that a woman undergoing retreat after the death of her husband may not adorn herself with jewellery or *kohl* or any other means. She ought to avoid all colours except black, and all perfumes: she ought not to dye her fingers with henna, and should not use scented oil, or dress her hair with any scented substance.

136. Mourning is incumbent on all females, whether major or minor; but there is a controversy as to whether it is incumbent on a scriptural woman.

137. A woman who has been repudiated by her husband, is under no obligation as to mourning.

138. A scriptural woman, left a widow or repudiated by her Muslim husband, is in either case bound to undergo retreat.

LODGING OF WIVES.

139. A husband is bound to provide lodging (during retreat) for wives repudiated by him subsequent to consummation.

١٤٠. ولا نفقةَ إلا للتى طُلِّقَتْ دونَ الثلاث وللحامل كانتْ مُطَلَّقةً واحدةً أو ثلاثا

١٤١. ولا نَفقة للمُخْتَلعةِ إلا فى الحَمْلِ

١٤٢. ولا نفقَةَ للمُلاَعَنَة وإن كانت حاملاً

١٤٣. ولا نَفقَةَ لكل مُعتدَّة من وَفاة ولها السُّكْنَى ان كانت الدارُ للميَت أو قد نَقَدَ كراءها

١٤٤. ولا تخرُجُ من بيتها فى طلاق أو وَفَاة حتى تُتمَّ العدَّةَ

١٤٥. إلا أن يُخْرجَها رَبُّ الدار ولم يَقبَلْ من الكراء ما يُشْبه فلْتَخْرُجْ وتُقيمْ بالموضع الذى تَنتَقل اليه حتى تَنقضىَ العدَّةُ

١٤٦. والمرأةُ تُرضِعُ ولدَهَا فى العصمة إلا أن يكونَ مثْلُها لايُرضِعُ

١٤٧. وللمطلَّقة رَضاعُ ولَدها على أبيه ولها أن تأخذَ أجرةَ رَضاعِها ان شاءت

140. But he is not bound to provide maintenance, except where the repudiation has been short of a triple one or where the woman is pregnant: for in that case it is immaterial whether the repudiation be single or triple.

141. A woman who has obtained a release from her husband is not entitled to maintenance, except in the case of pregnancy.

142. A woman separated from her husband by action of imprecation, will, even in the case of her pregnancy, have no claim to maintenance.

143. A widow is not entitled to maintenance during her retreat: but she is entitled to lodging, in case her house belonged to the husband or he had paid the rent.

144. A woman ought not to change houses during her retreat, whether following on the death of her husband or on repudiation.

145. Where the landlord refuses the usual rent and ejects her, she may leave the house, but should remain in the place to which she removed until the expiry of her retreat.

146. A woman must suckle her child so long as the marriage-tie remains; except where it is not customary for women in her position to suckle their children.

147. A woman repudiated by her husband is entitled to suckle her child, even against the wishes of the father: she may if she pleases claim hire for suckling it.

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144. When it is necessary she may change her abode: e. g. when the first house is in a state of dilapidation, or she is afraid of thieves.

﴿ الحَضانة ﴾

١٤٨. والحَضانةُ للأُمِّ بعدَ الطلاقِ إلى احتلامِ الذكَرِ ونكاحِ الأُنثى و دخولِها

١٤٩. وذلك بعدَ الأمّ (إن ماتت أَو نُكِحَتْ) للجَدّةِ ثم للخالةِ

١٥٠. فان لم يكن من ذَوِى رَحِمِ الأُمّ أحدٌ فالاخواتُ والعمّاتُ فان لم يكونُوا فالعَصَبةُ

﴿ النَّفَقة ﴾

١٥١. ولا يلزمُ الرجلَ النفقةُ إلّا على زوجته كانت غَنيةً أو فقيرةً

١٥٢. وعلى أبوَيه الفقيرَين

١٥٣. وعلى صغارِ ولَدِه الذين لا مالَ لهم - على الذُّكورِ حتى يَحتَلِمُوا ولا زَمانةَ بهم و على الاناثِ حتى يُنكَحْنَ ويَدخُلَ بهنّ أزواجُهنّ

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150. The order here followed, it will be noticed, differs very widely from that which applies in succession: (see below, appendix L): the preference being given to females over males, and to the maternal over the paternal stock. — An agnate will in no case obtain the custody, unless he has some female (e.g. his wife) who will take charge of the child.

CUSTODY OF CHILDREN.

148. A woman repudiated by her husband is entitled to the custody of her child till it attains puberty in the case of a boy, or in the case of a girl till her marriage followed by consummation.

149. If the mother be dead or has remarried, the person next entitled to the custody of the child is the grandmother: after her comes the maternal aunt.

150. Failing maternal relations, the right will pass to the child's sisters and paternal aunts; failing these, to the child's agnatic relations.

MAINTENANCE.

151. A man is bound to provide maintenance only for the following: — (a) His wives: his obligation to do so is the same whether they be rich or poor.

152. (b) His parents, when they are needy;

153. (c) His minor children who have no property. This obligation towards children will terminate, in the case of males, on their attainment of puberty, where they are not disabled by any chronic disease; in the case of female children, on their marriage followed by consummation.

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151. Where the parents are capable of supporting themselves, even though by an occupation derogatory to their dignity, the son is not bound to support them.

152. If his mother (or daughter) marries a poor man, the obligation to provide her with maintenance does not drop: if the husband can provide part, the son (or father) is bound to supply what more is necessary.

153. The reference is to chronic disease disabling the son from earning his living by an occupation suitable to his rank in life.

١٥٤ . ولا نفقةَ لمن سوَى هؤلاء من الأقاربِ

١٥٥ . وإن اتَّسعَ فعلَيه إخدامُ زوجتهِ

كفن الزوجة

١٥٦ . و اختُلفَ فى كفَن الزوجة

١٥٧ . فقال ابنُ القاسم فى مالِها وقال عبدُ الملِك فى مالِ الزوجِ

١٥٨ . و قال سَحْنُونٌ إن كانت مَلِيَّةً ففى مالِها وإن كانت فقيرةً ففى مالِ الزوج

154. Thus there is no obligation to support sisters or grand-children. Neither is a woman bound to support her own child, left an orphan by the death of his father, beyond

154. No other relatives except those mentioned above are entitled to maintenance.

155. A man who is in good circumstances ought to provide servants for his wives.

BURIAL OF WIVES.

156. There is controversy as to the husband's obligations with respect to his wife's burial.

157. Ibn al-Ḵāsim says the expenses are to be defrayed out of her own property; ʿAbd-al-Malik says they should come out of the husband's property.

158. Saḥnūn says that if the woman is solvent the expense should be borne by her estate; but if she be insolvent, then by that of the husband.

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paying for its suckling when she has not milk to suckle it herself: the reason for this seemingly hard rule is the policy of the law to throw the whole burden of the child's support upon the father.

باب في الوصايا

١٥٩. وَيَحِقُّ على مَن له ما يُوصِى فيه أن يُعِدَّ وصيَّتَه

١٦٠. ولا وصيةَ لوارثٍ

١٦١. والوَصايَا خارِجَةٌ من الثُلُثِ و يُرَدُّ ما زاد عليه الا أن يُجيزَه الوَرَثَةُ

١٦٢. ما فَرَّطَ من الزكاة فأوصَى به فانَّ ذلك في ثُلُثه مُبَدًّأ على الوصايا

١٦٣. واذا ضاق الثُلُثُ تحَاصَّ أهلُ الوَصايا التى لا تبدئةَ فيها

١٦٤. ولِلرجُلِ الرجوعُ عن وصيَّتِهِ

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159. By making preparations (أن يُعِدَّ) here the author refers to calling witnesses to take notice of his will; the propriety of doing so is expressly laid down in the Kur-ān V, 105—107 with regard to oral testaments. In the case of written wills, non-compliance with the requirement will render the document invalid even though in the testators own handwriting; unless indeed the deceased has made a declaration to the effect that any document found in his handwriting is to receive effect.

160. The reason of this rule is the necessity of checking any interference with the principles of succession: cf. rules 61—64, 285, 286—288. A bequest in favour of an heir is invalid, even though sanctioned by his co-heirs; but it may receive effect as a gift from them, or such of them as accord their sanction.

161. For the meaning of "disposable third", see above, rule 62, note. The limitation of the testamentary power to a third

CHAPTER III.

ON WILLS.

159. A man who has means to dispose of by will ought to make preparations for that purpose.

160. No bequest can be made in favour of an heir.

161. Bequests are to be paid out of the disposable third of the deceased's estate; if they exceed the third, the excess is to be rejected, unless the heirs ratify it.

162. Dues of purification left unpaid, in the event of the deceased bequeathing the amount, will be paid out of the disposable third in preference to other legacies.

163. When the third is insufficient, the unpreferred legatees will divide it among them.

164. A man may cancel a bequest made by him.

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of the estate is not laid down in the Kur-ān, but rests on a traditional direction given to Abū Wakkas, when the latter was supposed to be dying. The clause "unless the heirs ratify it", covers rule 160 as well as the present rule: in either case the principle is the same, viz., that the legacy, or the excess over the disposable third, if allowed to stand, will be a gift from the co-heirs or heirs, rather than legacy from the deceased.

162. Zakāt is a religious tax levied on the visible property of any Muslim as ascertained by agents employed for the purpose: its object is the relief of the poor and public services. Properly it is payable in kind, and for this reason, zakāt already due and unpaid stands much in the same legal position as articles deposited with the deceased, debts secured by a pledge and other real rights: hence the special treatment accorded to it.

163. The process will be the same as that applied in the case of shares in a succession exceeding unity; see rule 231, 305, 306 and appendix C.

﴿ بابٌ في الهبَة والصَّدَقَة ﴾

١٦٥. ولا تَتِمُّ هِبَةٌ ولا صدَقةٌ الا بالحِيازَةِ

١٦٦. فان ماتَ قبْلَ أن تُحازَ عنه فهي ميراثٌ

١٦٧. الا أن يكونَ ذلك في المَرَض فذلك نافذٌ من الثلُث ان كان لغيرِ وَارثٍ

١٦٨. والهبةُ لِصِلَةِ الرَّحمِ أو لفقيرٍ كالصَّدَقة لا رُجوعَ فيها

١٦٩. ومَن تصدَّقَ على ولَدِه فلا رجوعَ له و له أن يَعْتَصِر ما وَهبَ لولده الصغير أو الكبير

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165. The distinction between a gift (هبة) and a charitable donation (صدقة) must be noted. The former occurs where possession is given of some useful thing for the benefit of the donee: the latter where possession is given for God's sake.

CHAPTER IV.

GIFTS, AND CHARITABLE DONATIONS.

165. A gift, or a charitable donation, is only complete on possession.

166. If the donor dies before the donee enters on possession, the gift will form part of his succession.

167. Where the gift has been made during the deceased's last illness, it will be paid out of the disposable third; provided always that it is not in favour of an heir.

168. A gift, in favour of a near relative, or in favour of a poor person, is like a charitable donation: i. e. it is irrevocable.

169. A charitable donation in favour of a child is irrevocable: but a donor may take back an ordinary gift made to a child, minor or major.

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167. This is another example of the law's vigilance to prevent any infringement, direct or indirect, of the law of succession; (cf. above, rules 61—64): gift during last illness being a means by which the principles of succession might be defeated, a gift made under such circumstances will have effect only as a legacy, i. e., it will stand only to the extent of a third of the deceased's estate. As to the prohibition against legacies in favour of an heir, see rule 160.

١٧٠. ما لم يُنكَحْ لذلك أو يُدايَنْ أو يُحْدِثْ في الهبَة حدَثًا

١٧١. والأُمُّ تَعتَصِرُ ما دامَ الابُ حيًّا فاذا ماتَ لم تَعتَصِرْ ولا يُعتَصَرُ من يتيمٍ

١٧٢. واليُتْمُ مِن قِبَلِ الابِ

١٧٣. وما وَهَبه لابنه الصغيرِ فحيازَتُه له جائزةٌ اذا لم يَسكُنْ ذلك أو يَلبَسْه ان كان ثوبًا

١٧٤. و انما يحوزُ له ما يُعْرَف بعينهِ

١٧٥. و أما الكبيرُ فلا تَجوزُ حيازَتُه له

١٧٦. ولا يَرْجِعُ الرجُلُ في صدقتِه

١٧٧. ولا تَرجِعُ اليه الا بالميراثِ

١٧٨. ولا بأسَ أن يَشْرَبَ من لَبَنِ ما تَصدَّق به

170*a*. For example, a grown-up son has received a sum of money from his father, and entered upon matrimony in reliance thereon as a means of defraying the expenses of the married life.

170*c*. For example, forming a piece of iron into an implement of any sort.

170. But a gift to a child will be irrevocable where (a) it has formed the basis of a marriage; (b) where the child has borrowed money in consequence thereof; (c) where the child has changed the nature of the gift by manufacture.

171. A mother may revoke a gift to her child, so long as the father is alive; but when the father dies, the gift becomes irrevocable: because a gift in favour of a person who is an orphan cannot be revoked.

172. Orphanhood consists in the loss of one's father.

173. In the case of a gift by a father to his minor child, possession may be retained by the father, subject to the principle that he shall not inhabit or wear (in the case of a garment) the subject of the gift:

174. He may take possession on behalf of the child only of specific articles.

175. In the case of a gift to an adult son, retention of possession is not permissible.

176. Charitable donations may not be revoked.

177. The only mode in which they may return to the donor will be by inheritance.

178. There is no harm in a donor drinking the milk of an animal given by him as a charitable donation.

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173. Where a father retains possession in this way, he must in order to validate the gift call witnesses to attest the making thereof; it is not necessary, however, for him to specifically state the retention of possession.

174. The opposite of specific articles would be dirhams or dīnārs; (excluding always the case of these also being rendered specific by marking).

١٧٩. ولا يَشتَرى ما تَصدَّق به

١٨٠. ويُكرَه أن يَهَبَ لبعضِ ولَدِه مالَه كُلّه وأمّا الشىء منه فذلك سائغٌ

١٨١. ولا بأسَ أن يَتصدَّق على الفُقَراء بمالِه كلّه لله

١٨٢. و مَن وَهَبَ هِبَةً فلم يَحُزْها الموهوبُ له حتى مَرِضَ الواهِبُ أو أَفلَسَ فليس له حينئذ قَبْضُها

١٨٣. و لو ماتَ الموهوبُ له كانَ لوَرَثتهِ القيامُ فيها على الواهبِ الصحيحِ

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180. This reason, (like rr. 61, 64, 167, 285, 286, 288) is founded on respect for the law of succession: a man ought

179. He may not buy what he has so given.

180. It is censurable for a man to make a gift of all his property to any one child: he may so dispose of only a part.

181. He may give the whole of his property to the poor, for the sake of God.

182. When a donee fails to take possession of a gift made him, until the donor falls ill or becomes destitute, he cannot take possession of it.

183. If the donee dies, his heirs may claim the gift against a donor who is in good health.

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not to defeat his natural heirs, and any course of action which will have that effect is subject to censure.

181. This holds good so long as the man does not deliberately intend to injure his family.

باب في الاقضية و الشهادات

١٨٤. والبيّنةُ على المدّعى واليمينُ على مَن أنْكَرَ

١٨٥. ولا يمينَ حتى تَثبُتَ الخُلْطَةُ أو الظِّنَّةُ

١٨٦. و اذا نَكَلَ المدّعَى عليه لم يُقضَ للطالبِ حتى يَحْلِفَ فيما يَدّعى فيه مَعْرِفَةً

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184. The party called المدّعى (which word we have here translated "plaintiff") is not necessarily the one who first brings the matter before the judge: it is rather a matter for the court to determine on which the *onus probandi* lies. "The المُدّعِى is he who says It was: the المُدّعَى عليه is he who says It was not. Proof is demanded from the former on account of the weakness of his side; an oath is demanded from the second on account of the strength of his side, as having the benefit of the main principle which is in favour of non-liability. An oath is not administered immediately on the statement of the claim, in cases where the matter can only be established by two honourable witnesses (e. g. repudiation or marriage): if, however, one witness gives evidence in support of the claim, then an oath is due from the defendant to rebut the testimony of that witness." Al-Sharnūbī.

CHAPTER V.

ON JUDGMENTS AND EVIDENCE.

184. The burden of proof is on the plaintiff: an oath is incumbent on him who denies.

185. No oath can be exacted unless proof has been given of (contractual) business relations between the parties, or where there are grounds for strong suspicion.

186. When the defendant refuses the oath, judgment is not given in favour of the plaintiff till he himself has sworn, in a case where he makes his claim on the ground of certain knowledge.

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185. No oath will be exacted until business relations have been proved to have existed between the parties, if only by a single act of borrowing and lending. الظِّنَّة means suspicion; but the modern practice is in favour of administering the oath without inquiry as to business relations or grounds of suspicion.

186. The rule applies to cases where the plaintiff, for example, pretends to identify the arcticle claimed by him, specifying its quantity, quality etc.: under such circumstances he must, even when the defendant evades the oath, confirm his pretensions by swearing himself. But if on the other hand he rests his claim upon mere grounds of suspicion, (e. g. declaring that he suspects a man of having stolen his property), then the defendant is held to be convicted at once by his refusal to swear, and no oath will be exacted from the plaintiff.

١٨٧ . و اليمينُ باللّه الذى لا إلٰه الا هُوَ

١٨٨ . ويَحْلفُ قائماً و عِندَ مِنْبَرِ الرّسولِ صلى اللّهُ عليه و سلّم في رُبْعِ دينارٍ فأكثرَ

١٨٩ . و فى غيرِ المَدينْة يَحلِفُ فى ذلك فى الجَامعِ و مَوضعٍ يُعَظِّمُ منه

١٩٠ . ويَحْلِفُ الكافِرُ باللّهِ حيثُ يُعَظِّمُ

١٩١ . واذا وجَدَ الطَّالِبُ بَيِّنَةً بعد يَمينِ المَطْلوبِ لم يكن عَلِمَ بها قُضِىَ له بها

١٩٢ . وان كان عَلِمَ بها فلا تُقْبَلُ منه وقد قيل تُقْبَلُ منه

الاثبات بالبينة

١٩٣ . ويُقْضَى بِشاهدٍ ويَمينٍ فى الامْوالِ ولا يُقْضَى بذلك فى نِكاحٍ أو طَلاقٍ

١٩٤ . ولا تجوزُ شَهادَةُ النّساءِ إلا فى الامْوالِ

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188. This applies to proceedings in the town of Medina.

189. E. g., the mihrāb which is the arched part of the Mosque where the Imām stands: it is in the portion of the building towards Mecca.

187. The oath to be taken is: "By God, besides whom there is no other god".

188. The oath is to be taken standing, near the pulpit of the Prophet, with regard to claims to the amount of a quarter of a dīnār or upwards.

189. Outside Medina the oath is to be taken in the principal Mosque, and in the most venerated part.

190. To an unbeliever the oath is to be administered in a place which he holds in veneration.

191. When, after the defendant has sworn, the plaintiff discovers some evidence of which he was not aware before, judgment may be given thereon in his favour:

192. But if he knew beforehand of the existence of the evidence, according to one view it will be inadmissible: according to another it may be accepted.

PROOF BY EVIDENCE.

193. Judgment with regard to questions of property may be given on the evidence of one witness and an oath; but no judgment may be given on such grounds with regard to a marriage, or a repudiation.

194. The testimony of women is inadmissible except in questions as to property.

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190. "A Jew is to be sworn in a synagogue; a Christian, in a Church; a majūsī in a fire-temple."

191. The plaintiff must take an oath that he did not know of the evidence before, or that he had forgotten it.

١٩٥. و مائَةُ امْرَأَةٍ كامْرَأَتَيْنِ وذلك كَرَجُلٍ واحدٍ

١٩٦. يُقْضَى بذلك مَعَ رَجُلٍ أو مع اليَمينِ فيما يجوز فيه شَاهِدٌ و يَمِيْن

١٩٧. وشَهادَةُ امْرَأَتَيْنِ فقط فيما لا يَطَّلِعُ عليه الرِّجالُ من الْوِلادَةِ والاسْتِهْلَالِ و شِبْهِهِ جائِزَةٌ

ما تجوز من الشهادة

١٩٨. ولا تجوزُ شهادةُ خَصمٍ ولا ظَنِينٍ

١٩٩. ولا يُقْبَلُ الا العُدُولُ

٢٠٠. ولا تجوزُ شهادةُ المَحدُودِ ولا شَهادةُ صبيٍّ ولا كافرٍ

٢٠١. واذا تابَ المحدُودُ فى الزِّنا قُبِلَتْ شَهادتُهُ إلا فى الزِّنا

٢٠٢. ولا تجوزُ شَهادةُ الابنِ للأَبَوَيْنِ ولَا هُما لَهُ

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195. That is to say that, for example, four women are not equal to two men; nor will one woman and an oath be accepted as sufficient.

197. But one woman and an oath will not suffice. The second illustration refers to a case where an inheritance or the like depends on the question whether a child was born alive or dead: crying is one of the recognised tests of live-birth.

195. A hundred women are equal to two women and two women are equal to one man.

196. Judgment may be given on the testimony of women coupled with that of one man, or with an oath in cases in which one witness and an oath are acceptable.

197. The testimony of two women alone is to be accepted with regard to matters about which men can have no knowledge: e. g. childbirth, or the crying of a child.

WHAT TESTIMONY IS ADMISSIBLE.

198. The testimony of an enemy, or one suspected of irreligion, is not to be admitted.

199. None but honourable persons are to be accepted as witnesses.

200. A person who has undergone punishment for crime, may not be accepted: nor the testimony of a minor: nor that of an unbeliever.

201. When a man, who has undergone punishment for fornication, repents, his evidence may be accepted except in a case of fornication.

202. A man may not give evidence in favour of his parents; nor parents in favour of the son.

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200. In order to be admitted to give evidence a man must be: first, a Muslim; 2ndly, free; 3rdly, possessed of reason; 4thly, adult; 5thly, of pure morals.

202. The meaning is that a descendant of any sort may not give evidence in favour of an ascendant, *et vice versa*.

٢٠٣. ولا الزَّوجُ للزَّوجَةِ و لا هي له

٢٠٤. وتَجوزُ شَهادةُ الاخِ العدْلِ لاخيهِ

٢٠٥. ولا تجوزُ شَهادةُ مُجَرَّبٍ فى كَذِبٍ

٢٠٦. أو مُظْهِرٍ لكَبيرَةٍ

٢٠٧. ولا جارٍّ لنفْسِهِ ولا دافعٍ عنها

٢٠٨. ولا وصيٍّ ليَتيمِهِ وتجوزُ شَهادتُهُ عليهِ

﴿ التعديل ﴾

٢٠٩. ولا يجوزُ تَعْديلُ النّساءِ ولا تَجريحُهُنَّ

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203. Nor may a man give evidence for his father-in-law, nor his mother-in-law, nor his step-son; and similarly with respect to the woman's testimony.

204. The meaning is that a man who is pre-eminent for integrity of character may be admitted in such a case.

205. This excludes anyone who tells a lie more than once in a year.

206. The same rule applies to one who is proved by evidence to have secretly committed one of the greater sins: (drinking wine, lending money at interest); so long as he does not repent.

207. An example of securing a profit is giving evidence on behalf of a partner. An example of escaping a loss, is giving evidence in favour of a common debtor against another creditor of that debtor, to the effect that he has paid his debt to the other creditor; the result being that the debtor, escaping liability for the one debt, will be in a better position to pay that due to the would-be witness. In both these cases the testimony will be rejected.

203. Nor a husband in favour of his wife; nor a wife in favour of her husband.

204. A man who is of honourable character may be admitted to give evidence on behalf of his brother.

205. A person of lying habits is not to be accepted as witness.

206. A person who openly commits any of the greater sins is inadmissible.

207. A man is not to be accepted as witness with regard to a matters where his own profit or loss is concerned.

208. Nor a testamentary guardian on behalf of his ward; but he may give evidence against him.

TESTIMONY AS TO CHARACTER.

209. Testimony as to character may not be called in the case of women; nor may they be discredited.

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208. The rule may be stated generally that the fact of a person being debarred from giving evidence on behalf of another will not prevent him giving evidence against that other.

209. Testimony as to character (التعديل) and the discrediting of witness (التجريح) play a great part in Muslim judicial procedure. The former is employed where it is desired to bring as witness some person who is not personally known to the judge: without such knowledge or what is equivalent thereto no witness can be admitted: the equivalent is taʿdīl, i. e. the bringing of two honourable persons known to the judge to testify to the good character of the witness whom it is desired to have admitted — Tajrīḥ is the converse process. When witnesses have been brought on one side, it is the duty of the judge to invite the opposing party to show cause why their testimony should be rejected: and where valid grounds of objection (e. g. impiety, looseness of life, bribery etc.) are averred and proved, the evidence of the first witnessess will be treated as non-existing. See also Appendix A.

٢١٠. ولا يُقْبَلُ فى التزكِيَّةِ الا مَن يقولُ «عدْلٌ رِضاً»

٢١١. ولا يُقْبَلُ فى ذلك ولا فى التَّجْرِيحِ واحدٌ

شهادة الصبيان

٢١٢. وتُقْبَلُ شَهادةُ الصِّبيانِ فى الجِراحِ قبل أَنْ يَفْتَرِقُوا أو يَدخلَ بينهم كبيرٌ

ولىّ الايتام

٢١٣. على وَلِيِّ الأَيْتامِ البينةُ أنه أَنْفَقَ عليهم

٢١٤. أودَفَعَ اليهم

٢١٥. وان كانوا فى حَضَانَتِهِ صُدِّقَ فى النَّفَقَةِ فيما يُشْبِهُ

الصلح

٢١٦. والصُّلْحُ جائِزٌ الا ما جَرَّ الى حَرَامٍ

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210. This rule can have importance only where Arabic is the language of the country.

212. I. E., *inter se*; see p. 101, (h). The law is thus framed in view of the ease with which infantile evidence may be vitiated by suggestion. Wounding includes homicide.

213. The supposition is that the guardian has not the custody of the persons of the wards, but merely charge of

210. Testimony as to character can be given only in the form of a declaration that the witness referred to is "honourable and acceptable".

211. A single person testifying to character will not suffice.

MINORS.

212. With respect to charges of wounding, the testimony of minors may be accepted, provided it is offered before they disperse and before any adult person comes among them.

PRESUMPTIONS RELATING TO GUARDIANS.

213. The burden of proof is on a guardian to show that he has provided maintenance for his orphan wards;

214. Or that he has delivered their property to them.

215. But if the wards be in his custody, his statement as to disbursements for their maintenance will be credited where there are probabilities in its favour.

SETTLEMENTS OF CLAIMS

216. The settlement of claim is permissible, unless where involving what is illegal.

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their property: the haḏānah (see above, rule 148) being vested in some other (generally a female) relative.

214. That is to say, when the wards have come of age, or been emancipated.

215. He will be believed on his oath.

216. The Ḵur-ān, (IV, 127) says: "The friendly settlement of disputes is a great merit". The passage has reference specially to marriage; but it is capable of, and has commonly received a wider application.

٢١٧. و يجوزُ على الأقرارِ و الأنكارِ

الوصيّ

٢١٨. و وصيُّ الوَصِيِّ كالوصيِّ

٢١٩. وللوَصِيِّ أن يَتَّجِرَ بأموالِ اليَتامَى

٢٢٠. و مَن أوصَى الى غيرِ مأمونٍ فانّهُ يُعْزَلُ

تصرف تركة الميت

٢٢١. ويُبْدَأُ بالكَفَنِ ثم الدَّينِ ثم الوَصِيَّةِ ثم المِيرَاثِ

٢٢٢. ولا يجوزُ اقرارُ المريضِ لوَارِثِهِ بِدَيْنٍ أو بِقَبْضِهِ

٢٢٣. ومَن أوْصَى بِحَجٍّ أُنْفِذَ والوَصِيَّةُ بالصَّدَقَةِ أَحَبُّ الينا

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218. A testamentary guardian may provide for the carrying on of his charge, by himself appointing a testamentary guardian to succeed him therein in the event of his death. His power to do so does not depend on his being specially authorised to that effect by the testator.

220. His removal will be by the Cadi.

217. It may proceed upon an admission, or upon a denial.

RULES AS TO TESTAMENTARY GUARDIANS.

218. A testamentary guardian of a testamentary guardian is like the testamentary guardian.

219. A testamentary guardian may trade with the property of his wards.

220. When an untrustworthy person has been appointed as testamentary guardian, he may be removed.

DISPOSAL OF ESTATE OF DECEASED PERSONS.

221. In matters of inheritance the order of preference will be: (1) funeral expenses; (2) debts of the deceased; (3) legacies; (4) the succession distributable among the heirs.

222. An acknowledgment of debt made by a man during illness in favour of an heir is invalid: likewise an acknowledgment of receipt of a debt due to him by the heir.

223. A bequest (to enable another) to perform the pilgrimage on the deceased's behalf is binding: but it is more commendable in our opinion to make a bequest for charitable purposes.

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221. The succession proper is merely (4); that is to say, what is left over after payment of the prior charges.

222. Cf. above, rules 61—64, 160, 167, as to the law's vigilance against any interference with the law of succession. The reference is to a dangerous illness, likely to cause death.

باب في الفرائض

۲۲۴. ولا يرث من الرجال إلّا عشرة - الابن و ابن الابن و ان سفل والأب والجدّ للأب و ان علا والأخ وابن الأخ وان بعد والعمّ وابن العمّ وان بعد والزوج ومولى النعمة

۲۲۵. ولا يرث من النساء غير سبع - البنت و بنت الابن والأمّ والجدّة والأخت والزوجة ومولاة النعمة

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224. For some general outlines of the law of succession, see (in the order in which they are here mentioned) appendices D (division of heirs into "sharers" and "residuaries" or "agnates"); C (reduction of fractional shares exceeding unity); L (rules of agnatic succession); G, T, K (agnatisation of female heirs); F, H (assimilation of ascendants to descendants *et vice versa*). In appendix L some of the main differences between Muslim and European systems of inheritance are pointed out: another which it may be well to point out here, at the commencement of the subject, is that succession in Muslim law necessarily implies succession *ab intestato*, legacies being regarded as charges on the estate (like funeral expenses debts etc.) the mīrāth or inheritance to be distributed among the heirs being merely what is left over after payment of such prior charges: cf. above, rule 221 and note. — Under "brother" in this rule (r. 224) are included brothers-german, consanguinean or uterine: for differences among them,

CHAPTER VI.

ON SUCCESSION.

224. Male heirs are ten in number, viz: 1st, the son; 2nd, the son's son, or any lower descendants; 3rd, the father; 4th, the paternal grandfather or any higher ascendant; 5th, the brother; 6th, the brother's son, even if remote; 7th, the paternal uncle; 8th, the son of the paternal uncle, even if remote; 9th, the husband; 10th, the patron.

225. Female heirs are seven in number, viz: 1st, the daughter; 2nd, the son's daughter; 3rd, the mother; 4th, the grandmother; 5th, the sister; 6th, the wife; 7th, the patroness.

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however, see below, rules 270—271. "Uncle" includes only paternal uncles, german or consanguinean. — The patron means in general one who has manumitted his slave: on the latter's death, leaving no nearer heirs, the manumittor (or his nearest 'aṣabah) will succeed to the estate. The mention thus made of a matter closely connected with slavery, has (contrary to the principle stated in our preface, page XI) been retained to avoid falsifying the author's enumeration of heirs.

224, 225. "Brother", "sisters" etc. here include brothers etc. whether german, consanguinean or uterine: but see below, rules 270—275. Grandmothers, maternal as well as paternal, may succeed: indeed the former has in some instances the preference: see below, rules 290, 291.

﴿ ميراث الزوج ﴾

٢٢٦. فميراثُ الزَّوْجِ مِنَ الزَّوْجَةِ ان لم تَتْرُكْ ولداً ولا ولد ابنٍ النِّصفُ

٢٢٧. فانْ تركتْ ولداً أو ولدَ ابنٍ منه أو من غيرِهِ فلَهُ الرُّبُعُ

﴿ الزوجة ﴾

٢٢٨. وترثُ هي منه الرُّبُعَ ان لم يكنْ له ولدٌ ولا ولدُ ابنٍ

٢٢٩. فان كان له ولدٌ او ولدُ ابنٍ منها أو منْ غيرها فلها الثُّمُنُ

﴿ الامّ ﴾

٢٣٠. وميراثُ الأمِّ من ابْنِها الثُّلُثُ ان لم يَتْرُكْ ولداً أو ولدَ ابنٍ أو اثْنَينِ من الاِخْوة ما كانوا فصاعدًا الّا فى فَرِيضَتَيْنِ

(١)٢٣٠. فى زَوْجَةٍ و أَبَوَيْنِ فللزَّوْجَةِ الرُّبُعُ وللأمِّ ثُلُثُ ما بَقِيَ وما بَقِيَ للأب

226. "You shall have the half of what your wives leave, if they have no child:" Kur-ān, IV, 13.

227. It is immaterial whether the child be male or female: even a child of fornication comes within the rule.

228. If the deceased leaves more than one wife, the fourth (or the eighth, see rule 229) will be divided among them.

HUSBAND.

226. The husband's share in his wife's succession, where she leaves neither child, nor a son's child, is a half.

227. If the wife leaves a child, or a child of any son whom she has borne, whether to the husband surviving her or to another, the widower's share will be a fourth.

WIFE.

228. A wife's share in her husband's succession, where he leaves neither a child, nor a son's child, is a fourth.

229. If the husband leaves a child, or grandchild (son's child), whether by her or by another wife, the widow's share will be an eighth.

MOTHER.

230. A mother's share in her child's succession, where he leaves neither a child, nor a son's child or lower descendant, nor two or more brothers (whatever they be), will be a third:

Except in two cases, viz:

230*a*. Where the deceased leaves a wife and two parents; then the wife will receive a fourth: the mother, one third of what remains; and the remainder thereafter will go to the father;

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230. Kur-ān IV, 12 (quoted in App. C). The author has in the first instance (not in the second) used the word "son" (ابنيها) with an inclusive signification, i. e. as meaning a son or a daughter: we have accordingly translated it "child". "Son's child" includes any lower descendant through males. "Brethren whatever they are", means brothers or sisters, german, consanguinean or uterine.

230*a*. See Appendix B.

(ب)٢٣٠. وفى زَوجٍ و أَبوَينِ فللزَّوجِ النِّصْفُ وللأُمِّ ثُلُثُ ما بَقِىَ وما بَقِىَ للأَبِ

٢٣١. ولها فى غير ذلك الثُّلُثُ الا ما نَقَصَها العَوْلُ الا أن يكونَ للمَيّتِ وَلَدٌ أو وَلَدُ ابنٍ أو اثنانِ مِنَ الاِخْوةِ ما كانا فلَها السُّدُسُ حينَئذٍ

الاب

٢٣٢. ومِيراثُ الأَبِ من وَلَدِهِ اذا انفَرَدَ ورِثَ المالَ كُلَّهُ

٢٣٣. ويُفْرَضُ له مع الوَلَدِ الذَّكَرِ أو وَلَدِ الابنِ السُّدُسُ

٢٣٤. فان لم يكن له وَلَدٌ ولا وَلَدُ ابنٍ فُرِضَ للأَبِ السُّدُسُ وأُعْطِىَ مَن شَرِكَهُ من أَهلِ السِّهامِ سِهامَهُمْ ثم كان له ما بَقِىَ

الابن

٢٣٥. ومِيراثُ الوَلَدِ الذَّكَرِ جميعُ المالِ ان كان وحْدَهُ

230*b*. See Appendix B.

231. See Appendix C.

232. See Appendix D.

233. "Each of his parents shall have a sixth of what he leaves, if he has a child", Kur-ān IV, 12. "Son's child": this means a son's son. A grand-daughter (son's daughter) will not deprive him of the character of a residuary. The same remark applies to rule 234.

230*b*. Where the deceased leaves a husband and parents, the husband will receive half the estate; the mother, a third of what remains; and what is left will go to the father.

231. In other cases (than these two) the mother will receive a third, (except where her share is diminished by reduction), unless where the deceased has left a child, or a son's child, or two brethren (whatever they are): in such case her share will be a sixth.

FATHER.

232. A father's interest in his child's succession will extend to the whole estate, where he is alone.

233. Where the deceased leaves a son, or a son's child, the father will receive a sixth.

234. Where the deceased leaves neither a child, nor a son's child, the father will receive both a sixth, and also whatever is left after payment of the shares of the other sharers.

SON.

235. A son's interest in the succession of a parent will extend to the whole estate, when he is alone.

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234. Examples may serve to render clear the varying nature of the father's right.

(a) Deceased leaves father, mother and daughter: daughter is entitled to $1/2$, mother to $1/6$, and the father to $1/6$ as sharer and there remains $1/6$ which he will take in the character of agnate.

(b) Deceased leaves father, mother and two daughters: two daughters are entitled to $2/3$, mother to $1/6$, and father takes remaining $1/6$ as a sharer.

(c) Deceased leaves father and grandson: father is entitled to $1/6$ as sharer, and grandson takes the remainder as agnate.

235. See Appendix E.

٢٣٦. أو يأخذ ما بقى بعد سهام من معه من زوجة و أبوين أو جد أو جدة

٢٣٧. وابن الابن بمنزلة الابن اذا لم يكن ابن

٢٣٨. فان كان ابن وابنة فللذكر مثل حظ الانثيين

٢٣٩. وكذلك فى كثرة البنين والبنات و قلتهم يرثون كذلك جميع المال أو ما فضل منه بعد من شركهم من أهل السهام

٢٤٠. وابن الابن كالابن فى عدمه فيما يرث ويحجب

البنت

٢٤١. وميراث البنت الواحدة النصف والاثنتين الثلثان فان كثرن لم يزدن على الثلثين شيئا

ابنة الابن

٢٤٢. وابنة الابن كالبنت اذا لم تكن بنت وكذلك بناته كالبنات فى عدم البنات

237. See Appendix F.

238. See Appendix G.

240. The grandson (like a son) excludes brothers and sisters of the deceased; but (unlike a son) he will not exclude a grand-daughter, but renders her 'aṣabah bi-ghayri-hi: See Appendix G.

236. Where there are others along with him (e. g. wife, parents, grandfather, or grandmother), he will take what remains after payment of their shares.

237. A son's son comes in the place of a son, when there is no son.

238. Where a son and daughter succeed together, the son shall receive a portion equal to that of two daughters.

239. Where there is a plurality of sons and daughters, whether few or many, they will divide in this ratio either (a) the whole estate, or (b) what remains after payment of the shares.

240. A son's son is like a son, in the absence of a son, with respect both to participation and to exclusion.

DAUGHTERS.

241. The share of a single daughter is a half; that of two daughters, two-thirds. If there are more than two, still they will receive no more than two-thirds among them.

GRAND-DAUGHTERS.

242. A son's daughter is like a daughter where there is no daughter: and two or more son's daughters are, in the absence of daughters, like two or more daughters.

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241. Ḳur-ān IV, 12.

242. The grand-daughter (son's daughter) will be entitled to half the succession, where (1) there is no son of the deceased, whether standing to her in the relation of father or of uncle, alive, to exclude her; (2) there are no daughters of the deceased.

٢٤٣. فان كانت ابنةٌ وابنةُ ابنٍ فللابْنَةِ النصْفُ ولابنةِ الابنِ السُّدُسُ تمامُ الثُّلُثَيْنِ

٢٤٤. وان كَثُرَتْ بناتُ الابنِ لم يُزَدْنَ على ذلك السُّدُسِ شيئًا ان لم يكن مَعَهُنَّ ذَكَرٌ وما بَقِىَ للعَصَبَةِ

٢٤٥. وان كانت البناتُ اثْنَتَيْنِ لم يكن لبناتِ الابنِ شىْءٌ الا أَنْ يكونَ مَعَهُنَّ أَخٌ فيكونَ ما بَقِىَ بينَهُنَّ وبَيْنَهُ لِلذكَرِ مِثْلُ حَظِّ الانْثَيَيْنِ

٢٤٦. وكذلك اذا كان ذلك الذَّكَرُ تَحْتَهُنَّ كان ذلك بينَهُ وبينهنّ كذلك

٢٤٧. وكذلك لو وَرِثَ بَناتُ الابنِ مع الابْنَةِ السُّدُسَ وتَحْتَهُنّ بناتُ ابنٍ مَعَهُنَّ أو تَحْتَهُنَّ ذَكَرٌ كان ذلك بيْنَهُ وبين أَخَواتِه أو مَنْ فَوْقَهُ من عَمَّاتِه ولا يَدْخُلُ فى ذلك مَنْ دَخَلَ فى الثُّلُثَيْنِ من بناتِ الابنِ

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243. See Appendix H.

244. See Appendix I.

245. Here there will be no complement for the grand-daughters, as there are two daughters to receive the whole two-thirds. Grandsons and grand-daughters will have the

243. If there be a daughter and a son's daughter, the former will receive a half, and the latter a sixth as complement of the two thirds.

244. If the son's daughters are more in number than two, still they will not receive more than a sixth; (unless where they succeed along with a male). The residuaries are entitled to the residue of the succession.

245. If there are two daughters, the son's daughter will not be entitled to anything, unless there be with them a brother: then they will divide with him the residue of the estate, the male receiving a portion equal to that of two females.

246. The existence of a male heir of lower degree will have a like effect; and the residue will be divided between him and the female heirs in the same ratio.

247. Similarly, if a son's daughters inherit along with a daughter, receiving a sixth of the estate, and below them are son's daughters having along with them in the same or a lower degree a male heir; the residue of the estate will be divisible between that male heir and his sisters, or those who are above him, i. e. paternal aunts. But no participation in this way will be granted to grand-daughters who receive any portion of the two-thirds.

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residue where there is any: but it may happen that the whole estate is exhausted by the shares, e. g. where the deceased leaves two daughters ($^2/_3$), father ($^1/_4$), mother ($^1/_8$), the sum of the fractions exceeding unity.

246, 247. See Appendix J.

﴿ الاخت ﴾

٢٤٨. وميراثُ الأُختِ الشَّقيقةِ النِّصْفُ والاثْنَتَيْنِ فصاعدًا الثُّلُثانِ

٢٤٩. فان كانُوا اخوةً وأَخَوات شَقائقَ أو لأَبٍ فالمالُ بينهم للذَّكَرِ مثْلُ حَظِّ الأُنْثَيَيْنِ قَلُّوا أو كَثُرُوا

٢٥٠. والأَخَواتُ مع البناتِ كالعصَبَةِ لَهُنَّ يَرِثْنَ ما فضَلَ عنهنّ ولا يُرْبَى لهنّ معهنّ

٢٥١. ولا ميراثَ للاخوَةِ والأَخَواتِ مع الأَبِ ولا مع الوَلَدِ الذَّكَرِ أو مع وَلَدِ الوَلدِ

٢٥٢. و الاِخْوَةُ للابِ فى عَدمِ الشَّقائقِ كالشَّقائق ذُكُورِهمْ وإناثهم

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248. Kur-ān IV, 175. The commentators interpret this text as referring exclusively to brothers and sisters german or consanguinean: in contrast to Sūrah IV, v. 15, which is regarded as having application to brothers and sisters uterine. A sister or sisters german will receive the shares here assigned to them where (a) the deceased leaves no children or other descendants through males, see rules 250, 251; (b) the deceased's father is not alive, see rule 251; (c) she is not agnatised by the existence of a male heir, see rules 249, 302 and Appendix P.

SISTERS.

248. The share of a sister german is a half: that of two or more sisters, two-thirds.

249. If there be brothers and sisters german or consanguinean, the property will be divided among them, a male receiving the portion of two females, whether they be few or many.

250. Sisters succeeding along with daughters stand to them in the relation of residuaries: they inherit what remains, but may not be aggrandised to the prejudice of the daughters.

251. Brothers and sisters will be entitled to no share when succeeding along with the father; or along with a male child of the deceased; or along with a child's child.

252. Brothers (or sisters) consanguinean are like brothers (or sisters) german, in the absence of brothers (or sisters) german.

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249. This is another example of the agnatisation of a female heir: cf. above, rule 238 and Appendix G. A sister german may also be agnatised by the existence of a grandfather: see below, rule 302 and Appendix P.

250. See Appendix K.

251. See Appendix L.

252. There is an exception in the case known as al-mushtarakah or "Participation", (see below, rule 263), there brothers consanguinean, unlike brothers german, will not be admitted to share along with the brothers uterine.

٢٥٣. فان كانتْ أختٌ شَقيقَةٌ و أُخْتٌ أو أَخواتٌ لأب فالنِّصْفُ للشَّقيقَةِ ولِمَنْ بَقِيَ مِن الأَخواتِ للأَبِ السُّدُسُ

٢٥٤. ولو كانَتَا شقيقتين لم يكنْ للأَخوات للأَب شيءٌ الّا أن يكونَ معَهن ذَكَرٌ فيأْخُذُون ما بَقِيَ للذَّكَرِ مِثْلُ حَظِّ الأُنْثَيَيْنِ

الاخ للامّ و الاخت للامّ

٢٥٥. ومِيراثُ الأُخْتِ للأُمِّ والأَخِ للامِّ سواءٌ السُّدُسُ لكُلِّ واحدٍ

٢٥٦. و ان كَثُرُوا فالثُّلُثُ بينهم الذَّكَرُ و الأُنْثَى فيه سواءٌ

٢٥٧. ويَحْجُبُهُمْ عن الميراثِ الوَلَدُ وَ بَنُوهُ والأَبُ والجَدُّ للأَب

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253. This is analogous to the case dealt with in rule 243, being another example of the "complement of the two-thirds" being awarded. If there were two sisters german they would be entitled to two-thirds (r. 248): when therefore there is merely one sister german and one or more sisters consanguinean, the former receives a half (being all to which she is entitled), and the remaining sixth is given to the latter, being divisible among them when they are more than one in number.

254. The male heir must in general be (a) of the same class; (b) in the same degree; (c) of the same strength of blood as the female heirs agnatised by him: (see App. G, T). There are, however, exceptions to the rule: for example a sister consanguinean will be rendered 'asabah, not only by a

253. If there is a sister german and a sister or sisters consanguinean, the sister german will receive a half, and the remaining sixth will go to the sisters consanguinean.

254. If there are two sisters german, the sisters consanguinean will receive nothing, unless there be along with them a male heir: then they take the residue, the male receiving a portion equal to that of two females.

BROTHERS AND SISTERS UTERINE.

255. The share of a sister uterine, or of a brother uterine, is the same, viz: a sixth each.

256. If there are more than one of them, they divide a third; in this instance males and females participate equally.

257. They are excluded from succeeding by a child of the deceased; or a son's children; or a father; or a paternal grandfather.

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brother consanguinean, but also by the existence of the grandfather: but, in accordance with the rule, she will not be rendered 'asabah by a brother's son. Being agnatised, sisters consanguinean will share the residue of the estate with brothers consanguinean in the usual ratio of one to two. But where there are sisters german, and no brother consanguinean to agnatise the consanguinean sisters, the residue will go to a son of a brother german of the deceased exclusively; neither his own sister nor his aunt will be entitled to participate.

255. Kur-ān IV, 15. Cf. rule 248 note and App. G.

256. Kur-ān, *ibid.*

257. A brother uterine, not being related to the deceased through males, can never succeed as an agnate: his right rests entirely on the text of the Kur-ān referred to above: for some other peculiarities, see below, rules 263—267 and App. M.

الاخ الشقيق أو للاب

٢٥٨. والأخ يرث المال اذا انفرد كان شقيقًا أو لأب

٢٥٩. والشقيق يحجب الاخ للاب

٢٦٠. وان كان أخ و أخت فأكثر شقائق أو لأب فالمال بينهم للذكر مثل حظ الانثيين

٢٦١. وان كان مع الاخ ذو سهم بدئ بأهل السهام وكان له ما بقى

٢٦٢. وكذلك يكون ما بقى للاخوة والاخوات للذكر مثل حظ الأنثيين

٢٦٣. فان لم يبق شئ فلا شئ لهم الّا أن يكون فى أهل السهام اخوة لام قد ورثوا الثلث وقد بقى أخ شقيق أو اخوة ذكور أو ذكور واناث شقائق معهم فيشاركون كلهم الاخوة للام فى ثلثهم فيكون بينهم بالسواء وهى الفريضة التى تسمى المشتركة

٢٦٤. و لو كان من بقى اخوة لاب لم يشاركوا الاخوة للام لخروجهم عن ولادة الام

258. The author here and in several following rules repeats

BROTHERS GERMAN AND CONSANGUINEAN.

258. A brother, when alone, inherits the whole estate, whether he be german or consanguinean.

259. A brother german excludes a brother consanguinean.

260. If there are one or more brothers and sisters, german or consanguinean, they participate together; a brother receiving the portion of two sisters.

261. If there be a sharer along with a brother, the sharer is to be satisfied first: and the brother will receive the residue.

262. When brothers and sisters divide the residue, a brother will receive the portion of two sisters.

263. When nothing remains for brothers and sisters they will receive nothing; unless there be among the sharers brothers uterine, taking the third, and there is also a brother german, or brothers and sisters german together: then all will participate with the brothers uterine in their third, all sharing equally. This case is known by the name of "Participation".

264. Brothers consanguinean will not share with brothers uterine; because there is no common bond of maternity between them.

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what he has already said expressly or by implication: see above, rules 252, 254. A brother german is always an agnate, unless in the case of al-mushtarakah mentioned below in rule 263.

262. Cf. above, rule 264.

263. See Appendix M.

264. The favour shown to brothers german in this case is not extended to brothers consanguinean; who, as also a brother consanguinean and a sister consanguinean, (see App. M), will be entirely excluded.

٢٦٥. وان كان مَن بَقِىَ أُخْتاً أو أخواتٍ لأَبَوَيْنِ أو لابٍ اعيلَ لهنّ

٢٦٦. وان كان من قبلِ الأمّ أخٌ واحدٌ أو أُخْتٌ لم تكن مشترِكةً وكان ما بَقِىَ للاخوةِ ان كانوا ذُكوراً أو ذُكوراً و اناثاً وان كُنّ اناثاً لِأَبَوَيْنِ أو لِأَبٍ أُعيلَ لَهُنّ

٢٦٧. والأَخُ لِلابِ كالشقِّيقِ فى عَدمِ الشّقيقِ الّا فى المُشترَكة

ابن الاخ

٢٦٨. وابنُ الأَخِ كالأَخِ فى عَدَمِ الاَخِ كان شَقيقاً أو لأَبٍ

٢٦٩. و لا يرِثُ ابنُ الاَخِ لِلأمّ

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265. The reason is that the sisters being sharers, (unlike brothers german, who are properly agnates), are entitled to their fixed shares in any case. Thus if the heirs be husband, mother, brothers and sisters uterine, and one sister german or consanguinean, the problem will work out thus:

Husband.	$1/2 = 3/6$	reduced to	$3/9 = 1/3$
Mother.	$1/6$	»	» $1/9$
Brothers and sisters uterine. . .	$1/3 = 2/6$	»	» $2/9$
Sister german or consanguinean	$1/2 = 3/6$	»	» $3/9 = 1/3$
	$9/6$		

Where there are two or more sisters german or consanguinean the common base will be 10.

265. If there remain only a sister or sisters, german or consanguinean, (in the case supposed above), it will be merely a case for the application of Reduction.

266. If there be only one brother uterine, or one sister uterine, the case of Participation will not occur; but the residue will go to the brothers, or brothers and sisters: but if there be only sisters german or consanguinean, it will be a case for the application of Reduction.

267. A brother consanguinean is like a brother german, in the absence of a brother german, except in the case of Participation.

NEPHEWS.

268. A nephew, (brother's son) is like a brother, in the absence of a brother; this holds good whether they (brother and nephew) be german or consanguinean.

269. The son of a brother uterine is never an heir.

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266. The student has only to work out the fractions involved, to realise the accuracy of the results here stated.

267. Cf. above, rule 264, note.

268. This is an instance of assimilation: see Appendix F. The assimilation is, however, by no means complete: (1) a nephew, unlike a brother, will not agnatise his sister; (2) unlike a brother, he will be excluded by a grandfather; (3) two nephews will not lower the mother's share, though two brothers will have that effect, see rule 230; (4) a nephew will not create the case of al-mushtarakah, see rule 263 and App. M.

تقديم الشقيق على غيره

٢٧٠. والأخ للأبوين يحجب الأخ للأب والأخ للأب أولى من ابن أخ شقيق

٢٧١. وابن أخ شقيق أولى من ابن أخ لأب

٢٧٢. وابن أخ لأب يحجب عماً لأبوين

٢٧٣. وعم لأبوين يحجب عماً لأب

٢٧٤. وعم لأب يحجب ابن عم لأبوين

٢٧٥. وابن عم لأبوين يحجب ابن عم لأب

الحجب

٢٧٦. وهكذا يكون الأقرب أولى

٢٧٧. ولا يرث بنو الأخوات ما كن ولا بنو البنات ولا بنات الأخ ما كان ولا بنات العم ولا جد لأم ولا عم أخو أبيك لأمه ولا يرث المسلم الكافر ولا الكافر المسلم ولا ابن أخ لأم ولا جد لأم ولا أم أبي الأم

270. Because the nephew is in a lower degree; and degree comes before blood. — See al-Jabari's rule, Appendix L.

PREFERENCE OF FULL BLOOD OVER HALF BLOOD.

270. A brother german will exclude a brother consanguinean; but a brother consanguinean will have the preference over the son of a brother german.

271. The son of a brother german will have the preference over the son of a brother consanguinean.

272. The son of a brother consanguinean excludes an uncle german.

273. An uncle german will exclude an uncle consanguinean.

274. An uncle consanguinean will exclude the son of an uncle german.

275. The son of an uncle german will exclude the son of an uncle consanguinean.

EXCLUSION OF HEIRS.

276. The nearer agnate is preferred to the more remote.

277. Sisters' sons will not succeed in any case; nor sons of daughters; nor the daughters of a brother, of whatever blood; nor the daughters of an uncle; nor the maternal grandfather; nor a father's brother uterine; nor a Muslim, in the succession of a non-Muslim; nor a non-Muslim in the succession of a Muslim; nor the son of a brother uterine; nor a maternal grandfather; nor the mother of a maternal grandfather.

271—276. These are various applications of al-Jabarī's rule: see Appendix L.

277. The Mālikī school differs from that of Abū Ḫanīfah and al-Shāfi'ī in not granting the position of heirs under any circumstances to relatives other than the sharers and agnates.

٢٧٨. ولا ترِثُ أُمُّ أَبِى الأبِ معَ ولَدِهَا أبِى المَيِّتِ

٢٧٩. ولا ترِثُ اخْوةٌ لِأُمٍّ مع الجَدِّ لِلأبِ ولا مع الوَلَدِ و وَلَدِ الوَلَدِ ذكرًا كان الوَلَدُ أو أُنْثَى

٢٨٠. ولا ميرَاثَ لِلاخْوَةِ مع الأَبِ ما كانوا

٢٨١. ولا يرِثُ عَمٌّ مع الجَدِّ

٢٨٢. ولا ابنُ أخٍ مع الجَدِّ

٢٨٣. ولا يرِثُ قاتِلُ العَمْدِ - يرِثُ قاتِلُ الخَطَا

٢٨٤. وكُلُّ مَن لا يرِثُ بِحَالٍ فلا يَحْجُبُ وارِثًا

The rules relating to the succession of the "distant kindred" (dhawī-l-arḥām) and the doctrine of Return, which considerably complicate the other systems referred to, need not therefore be dealt with here. On failure of agnates or sharers whose combined fractions absorb the whole inheritance, the estate or residue will, in countries where the Maliki rite prevails, pass to the bayt-al-māl or public treasury.

278. The rule might be stated more concisely: a grandmother will not succeed along with her son. The principle involved is a general one: any heir related to the deceased through an intermediary is excluded by that intermediary, if alive and able to inherit, thus a grandson is excluded by his father, where the latter is alive: and in like manner a grandfather by a father. For an exception in the case of brothers uterine, see App. M.

280—283. Applications of al-Jabari's rule: see App. L.

283. There is a ḥadīth: "The murderer shall have no right of succession", i.e., he may not succeed to his victim. This

278. The mother of the father's father cannot succeed along with her son, i. e. the father of the deceased.

279. Brothers uterine will not succeed along with the paternal grandfather; nor along with a child of the deceased, or a child's child, male or female.

280. Brothers, of whatever blood, cannot succeed in competition with the father.

281. An uncle cannot compete with the grandfather.

282. A brother's son cannot compete with the grandfather.

283. A murderer shall not inherit; but a person who has unintentionally committed manslaughter is not debarred.

284. Those who in a particular case do not succeed themselves, cannot exclude others.

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is an example of an impediment (مانع) existing to prevent succession by a person who is in the position of an heir; an heir so excluded is considered as non-existent, and can therefore never exclude another heir or diminish the share to which he is entitled. Cf. rule 284, note, and App. N.

284. An heir himself entirely excluded by another, can never entirely exclude a third heir; but he may cause a diminution of his share. For example, the existence of brothers of the deceased will reduce the mother's share to $\frac{1}{6}$ (r. 231), though they themselves may be excluded by the father. Again, suppose the deceased leaves a grandfather, a brother german and a brother consanguinean: the brother german will exclude the brother consanguinean (r. 270): nevertheless the existence of the latter will occasion a tripartite division of the inheritance, of which the grandfather will receive one-third, and the brother german the remaining two-thirds: see rule 301. For apparent exceptions to this rule, (i. e. instances in which an excluded heir would seem to entirely exclude others), and an explanation of the true light in which to regard them, see Appendix N.

﴿ المطلقة ﴾

٢٨٥. والمُطَلَّقَةُ ثَلاثًا فى المَرَضِ تَرِثُ زَوجَهَا ان ماتَ من مَرَضِهِ ذلك ولا يَرِثُها

٢٨٦. وكذلك ان كان الطَّلاقُ واحِدَةً و قد ماتَ من مَرَضِهِ ذلك بَعْدَ العِدَّةِ

٢٨٧. وان طَلَّقَ الصحيحُ امرأتَهُ طَلْقَةً واحِدَةً فانهما يَتَوارَثانِ ما كانت فى العِدَّةِ فان انْقَضَتْ فلا مِيراثَ بينهما بَعدها

﴿ نكاح المريض ﴾

٢٨٨. و مَن تَزَوَّجَ امرَأَةً فى مَرَضِهِ لم تَرِثْهُ ولا يَرِثُها

﴿ الجَدَّة ﴾

٢٨٩. وتَرِثُ الجَدَّةُ لِلأُمِّ السُّدُسَ وكذلك التى لِلأَبِ

٢٩٠. فان اجتَمَعَتا فالسُّدُسُ بينهما أَلا ان تكونَ التى لِلأُمِّ أَقْرَبَ بِدَرَجَةٍ فتكونَ أَولى به لانها التى فيها النَّصُّ

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285. Cf. above, rules 61—64, 167; and below, rule 288.

286. Cf. above, rule 64. The woman will succeed despite her marriage to another man during the interval. The husband will have no right of succession in case of survivorship, where the wife's death is posterior to the expiry of

REPUDIATION, EFFECT OF

285. A woman triply repudiated during the last illness of the deceased, has a right of succession to her husband; he, however, will have no right of succession to her.

286. If the repudiation was a single one, and the man died of the same illness after the expiry of her retreat, the result will be the same.

287. If a man in good health repudiates his wife by a single repudiation, they inherit from each other so long as she is in retreat: but if her retreat has expired, there is no succession thereafter.

MARRIAGE DURING ILLNESS.

288. When a man marries a woman during his last illness, she will not inherit from him; nor he from her.

GRANDMOTHERS.

289. The share of a maternal grandmother is a sixth; so also that of a paternal grandmother.

290. If the two are both in existence, they divide the sixth between them; unless where the maternal grandmother is nearer in degree, for in that case her right is the better, because there is a tradition in her favour.

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the ʻiddah: where she dies before its expiry, however, he will succeed.

288. Cf. above rules, 61—64. Even the consent of the man's heirs will not validate such a marriage.

289. By assimilation to a mother: see appendices F, H.

290. "Because there is a tradition in her favour": referring to a report that the Prophet gave her a sixth. The Caliph ʻUmar is said to have first given a share to the paternal grandmother, relying on analogy (قِيَاس).

٢٩١. وإن كانت التى لِلأبِ أقْرَبَهُما فالسُّدُسُ بَيْنَهُما نِصْفَين

٢٩٢. ولا يَرِثُ عندَ مالِكٍ أكثَرُ من جَدَّتَيْنِ أُمِّ الآبِ وأُمِّ الأُمِّ وأُمَّهاتِهما

٢٩٣. ويُذْكَرُ عن زَيْدِ بنِ ثابتٍ أنه وَرَّثَ ثلاثَ جَدّاتٍ واحدةً من قِبَلِ الأُمِّ واثنتين من قِبَلِ الآبِ أُمِّ الآبِ وأُمِّ أبى الآبِ ولم يُحْفَظْ عن الخُلَفاء توريثُ أكثرَ من جَدَّتَيْن

الجَدّ

٢٩٤. ومِيراثُ الجَدِّ اذا انْفَرَدَ فَلَهُ المالُ

٢٩٥. وله مع الولدِ الذَّكَرِ أو مع ولدِ الولدِ الذَّكَرِ السُّدُسُ

٢٩٦. فان شَرِكَهُ أحدٌ من أهلِ السِّهامِ غيرُ الاخْوةِ والأَخَواتِ فليُقْضَ له بالسُّدُسِ فان بَقِىَ شىءٌ من المالِ كان له

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292. In other words, the grandmothers entitled to succeed according to the rules of the Mālikī school are: (1) those related to the deceased through an unbroken line of females; (2) the paternal grandmother, her mother, maternal grandmother, and other ascendants through females: all others are excluded.

291. If the paternal grandmother be the nearer, the sixth is divided equally between them.

292. According to Mālik, not more than two grandmothers can succeed; viz., the father's mother, and the mother's mother, and the mothers of these two.

293. It is reported with regard to Zayd b. T̲h̲ābit that he attributed rights of succession to three grandmothers: that is to say, one on the mother's side; two on the father's side, viz., the father's mother, and the mother of the father's father. But no decision by the Caliphs is reported giving the inheritance to more than two grandmothers.

GRANDFATHERS.

294. The grandfather, when alone, will be entitled to take the whole estate.

295. When he succeeds along with a male child, or a male child's child, his share is a sixth.

296. If there are along with him any sharers (other than the brothers and sisters) let a sixth be assigned to him; if any residue remains he is entitled to it.

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293. Zayd b. T̲h̲ābit, a companion of the Prophet, born 15 years before the Hijrah; died 45, or according to other accounts 54 or 55 A.H. He was one of the "Seven jurisconsults of Medina," and reputed to be specially learned in the law of succession.

294—299. See Appendix O.

٢٩٧. فان كان مع أهلِ السهامِ اخْوَةٌ فالجَدُّ مُخيَّرٌ فى ثَلاثَةِ أَوْجُهٍ يَأْخُذُ أَىَّ ذلك أَفْضَلُ لهُ إمّا مُقاسَمَةَ الاخوةِ أو السُّدُسَ من رَأسِ المالِ أو ثُلُثَ ما بَقِىَ

٢٩٨. فان لم يكن معه غيرُ الاخْوَةِ فهو يُقاسِمُ أخًا وأَخَوَيْنِ أو عَدْلَهُما أربعَ أَخَواتٍ

٢٩٩. فان زادُوا فلهُ الثُّلُثُ فهو يَرِثُ الثُّلُثَ مع الاخْوةِ الا أن تكونَ المُقاسَمَةُ أفضلَ لهُ

٣٠٠. والاخْوَةُ لِلأَبِ معَه فى عَدمِ الشَّقائِقِ كالشَّقائِقِ

٣٠١. فان اجْتَمَعُوا عادَّهُ الشَّقائقُ بالذين لِلأبِ فمَنَعُوهُ بهم كَثرَةَ الميراثِ ثم كانوا أَحَقَّ منهم بذلك

٣٠٢. الا أن يكونَ مع الجَدِّ أُخْتٌ شَقيقَةٌ ولها أخٌ لأبٍ أو أُخْتٌ لِأبٍ أو أخٌ و أُخْتٌ لِأبٍ فتأْخُذُ نصفَها مما حَصَلَ و تُسَلِّمُ ما بَقِىَ اليهم

301. In a competition with the grandfather, brothers consanguinean rank the same as brothers german as against the former, but not as against the latter: that is to say, they will be included in the computation where the result will be to diminish the grandfather's share: but the benefit of this diminution will inure exclusively to the brother or brothers german, or sister or sisters german, where there are such, by virtue of the rule that the half-blood is excluded by the full-blood.

297. If there be, besides sharers, brothers of the deceased, the grandfather is given the option of three things, and will take whichever is most advantageous for him: the three are (1) an equal share along with the brothers, (2) a sixth of the whole estate, (3) or a third of the remainder.

298. It the grandfather succeeds along with brothers merely, he will divide the estate with them, provided that there are not more than one or two brothers, or (what is equivalent) four sisters.

299. If there are more brothers than two, he is entitled to the third; therefore he will inherit the third along with the brothers (i. e. the brothers taking the remainder) unless division be more advantageous to him.

300. Brothers consanguinean, will, in the absence of brothers german, be in the position of the latter as regards competition with the grandfather.

301. If there are both brothers german and brothers consanguinean, the former are entitled to reckon the latter in the computation, so as to diminish the grandfather's share: they will, nevertheless exclude the brothers consanguinean.

302. An exception, however, occurs where there is along with the grandfather a sister (but no brother) german, along with a brother consanguinean or sisters consanguinean, or a brother and a sister consanguinean: in such a case she will take her half (i. e., of the whole succession out of what is obtained on division, and the remainder will go to the brothers and sisters consanguinean.

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302. See Appendix P.

٣٠٣. ولا يُرْبَى لِلأَخَواتِ مع الجَدّ الا فى الغَرّاء وَحدَها وسَنَذْكُرُهَا بعدَ هذا

ذوى الارحام

٣٠٤. ولا يَرِثْ مِن ذَوِى الأَرحامِ الا مَن له سَهْمٌ فى كتابِ اللّهِ

الضرر اى العول

٣٠٥. واذا اجتمع مَنْ له سهمٌ معلومٌ فى كتابِ اللّهِ و كان ذلك أكثَرَ مِنَ المالِ أُدْخِلَ عليهم كُلِّهِمِ الضَّرَر و قُسِمَتِ الفرِيضَةُ على مَبْلَغِ سِهامِهِم

٣٠٦ ولا يُعَالُ للأُخْتِ مع الجَدّ الَّا فى الغَرّاء وحدَها و هى امرأةٌ تَرَكَتْ زَوجها و أُمَّهَا وأُخْتَهَا لأَبَوينِ أو لأَبٍ وجَدَّهَا فللزَّوْجِ النِّصْفُ ولِلأُمّ الثُّلثُ وللجَدّ السُّدُسُ فلما فَرغَ المالُ أُعيلَ للأُخْتِ بالنِّصْفِ ثلاثة ثم جُمِعَ اليها سهمُ الجَدّ فيُقْسَمُ جَميعُ ذلك بينهما على الثُّلُثِ لها والثُّلُثين له فتبلُغُ سَبْعَةً وعشرين سهمًا

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303. See below, rule 306 and Appendix Q.

304. Cf. above rule 277. The only dhawī-l-arḥām or maternal relatives mentioned in the Kur-ān are brothers and sisters uterine.

303. The sisters will not be aggrandised at the expense of the grandfather, but will succeed along with him as agnates: except in the case of al-Gharrā' ("Brilliant") mentioned below.

OTHER MATERNAL RELATIVES DEBARRED.

304. No maternal relative can succeed except those who are assigned a share in the Kur-ān.

REDUCTION.

305. When several heirs assigned shares in the Kur-ān occur together, so as that the entire property is exceeded, then all the shares are subjected to diminution; so that the estate may still be divided in proportion to their shares.

306. Reduction is not resorted to in the case of the sister succeeding along with the grandfather except in the case of al-Gharrā': viz., where a woman leaves a husband, a mother, a sister german or consanguinean and a grandfather. The husband will receive a half; the mother, a third; the grandfather a sixth; the property being thus exhausted, reduction will be applied for the benefit of the sister, whose share will thus be reduced from a half to three shares (i. e. three-ninths); this being added to the share of the grandfather, the sum is divided between these two; she receiving one-third; the grandfather, two-thirds. Thus the problem involves twenty-seven shares.

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305. For an account of the process of reduction here referred to, see Appendix C.

306. See Appendix Q.

APPENDIX A.

184. *Muslim procedure.* The student will do well to make himself acquainted at the outset with the leading principles of Muslim procedure: since he will find, when he comes to read any of the standard commentaries, that the whole fabric of the law consists largely of provisions which have grown out of the application of those principles, with necessary modifications more or less important in character, to each particular relation dealt with. It must further be realised at once that Muslim procedure is a thing by itself, entirely different from that followed under any modern European legal system: it has more analogy probably with mediaeval European methods, but upon that subject we cannot enter here. Perhaps we can best give a general idea of its nature by describing it as a self-acting system: that is to say, it aims at being automatic, in the sense of leaving as little as possible uncertain or subject merely to the discretion of the judge. For this purpose it goes into the most minute details: specifying exactly what amount of evidence is requisite in each particular case; describing how divergent evidence is to be reconciled; directing which side is to be preferred where the testimony is conflicting; fixing the initial presumptions arising from the nature of the claim, and a multiplicity of further presumptions connected with the details of the evidence. All this network of rules and presumptions is binding on the judge: it forms at once a check upon the arbitrary exercise of individual judgment, and a ground for disclaiming personal responsibility and escaping odium: it is not he, the judge, who decides the case; the rules of law provide for every detail, and it is merely his duty to refer to those rules. Such, so far as it can be expressed in a few words, is the principle of the system.

Cases brought before the Cadi may be divided into two classes: (1) cases in which the claimant admits his inability to offer testimony in proof of his contention, or in which he renounces the right to do so; (2) cases in which the claimant offers such testimony. In rules 184—192 our author deals first with cases of the former kind, and we shall follow the same order.

1. *Cases in which evidence is lacking etc.* An all-important point at the outset is to determine on which of the two parties lies the burden of the proof. In Muslim procedure, this will not necessarily be the claimant; and it is necessary for the student to bear in mind that the terms "plaintiff" and "defendant", by which we have translated المُدَّعِي and المُدَّعَى عليه, are misleading in this respect. Besides the traditional utterance of the Prophet forming the rule (r. 184), many definitions have been offerred by the jurists to distinguish the muddaʿī from the muddaʿā ʿalay-hi. That mentioned in the extract from al-Sharnūbī's *commentary*, is one of the best known: (a) "the muddaʿī is he who says '*it was*', and "the muddaʿā ʿalay-hi is he who says '*it was not*'." Another coming closer to the view which naturally presents itself to a European lawyer is: (b) "the party suing is the muddaʿī, "and the party sued is the muddaʿā ʿalay-hi." (كل طالب فهو مدّع وكل مطلوب فهو مدّعى عليه). Both these definitions, however, break down or become uncertain in application in certain instances, and the only one entirely reliable is: (c) "the muddaʿī is he whose averment lacks both any ordinary "and any special presumption in favour of its truth; and the "muddaʿā ʿalay-hi is he whose averment is supported by one "or other of those presumptions": (المدّعي هو الذي تجرد قوله عن أصل أو عرف شهد له بصدقه و المدّعى عليه من قد عضد قوله اما أصل او عرف فاحدهما كاف). These terms a ṣ l and ʿu r f which we have translated *ordinary and special presumptions*, are of much importance, and somewhat difficult to grasp. The idea involved in a ṣ l, may perhaps be most simply expressed by saying that it represents the normal or ordinary or fundamental position of matters as between the parties; ʿu r f or m a ʿh ū d ʿu r f a n on the other hand, represents any special circumstance connected with either party or both, or with the article etc. forming the subject of their dispute. Thus, for example where one man claims a debt from another, who denies any obligation whatsoever; or where one man claims to be the owner of a certain individual, who, on the other hand, declares himself to be a free man: in either case, the one making the claim is the muddaʿī, and

the one resisting it is the muddaʿā ʿalay-hi; because the aṣl or normal relation, in the one case, is the absence of liability, and in the other natural freedom. So if the claimant brings evidence in support of his claim, well and good; but if not, the defendant on taking an oath to the truth of his declarations will be discharged. That is an example of aṣl: one of ʿurf may also be given. Suppose husband and wife have a dispute as to the ownership of the furniture in a house occupied by them: in such a case, if the woman claims, for example, a spinning wheel or something generally used by and intended for women, she will be the defendant, in as much as the ʿurf or special destination of the article testifies in her favour. Yet another example may be given of a more special nature. Suppose a minor on attaining puberty sues his guardian for delivery of his property; the guardian avers that he has already delivered it; the ward denies the fact: in such a case the aṣl is held to be in compliance with what the law requires, viz., that a guardian when handing over to his wards their property, should call witnesses as directed in the Ḳur-ān: (cf. rule 213). He is therefore muddaʿā ʿalay-hi: yet it will be observed, that according to definition (a) and definition (b) the result should be the opposite: since it is the guardian who says *it was* and the ward who says *it was not*; and again, it is the minor who sues, and the guardian who is sued.

"When the doctor knows the complaint from which the "patient is suffering, he can tell at once what medicine is "appropriate for such a case; so he who knows the muddaʿī "from the muddaʿā ʿalay-hi, knows the general bearing of the "case:" such is the manner in which the jurists illustrate the importance of this initial distinction. What, then, is the next step? The muddaʿī is unable to bring evidence or renounces his right to do so: is the matter at once to be referred to the oath of the muddaʿā ʿalay-hi as rule 174 might seem to indicate? No. Before the muddaʿā ʿalay-hi can be called upon to do this, it is necessary for the muddaʿī to bring some commencement or adminicle of proof against him, by showing that there have been business relations existing between the two (see rule 185): for example, that the one has borrowed from, or lent to the other; unless indeed there be something in the occupation, antecedents etc. of the muddaʿā ʿalay-hi, or certain other special circumstances, to render such a commencement of proof unnecessary. Suppose, then, that this requirement is complied with, the muddaʿā ʿalay-hi now has the matter referred to his oath: that is to

say he is called upon to swear in a solemn manner in the Mosque etc., (rr. 187—190) that he owes the claimant nothing. On his doing this, judgment will be given in his favour: or if, on the other hand, when thus brought to the test, he admits liability, the case will terminate in judgment against him. But suppose he declines to swear: does this at once decide the matter in favour of the mudda'ī? No, it is necessary that the muddaʿī in his turn should take the oath, and it is only on doing so that judgment will be given in his favour: see rule 186. When the muddaʿā ʿalay-hi has allowed matters to go this length, expressly stating, "I will not swear", or saying to the muddaʿī, "Swear you and take possession" (احلف انت و خذ), he cannot subsequently reinstate himself in his former position by offering to bring evidence; unless indeed in a case where he can plead ignorance of the existence of such evidence in excuse of his conduct: see rules 191, 192.

2. *Cases in which evidence is tendered.* What number and what character of witnesses does the law require? This depends on the nature of the case. (a) To prove a charge of adultery etc., no less than four male witnesses will be necessary: (b) in questions of personal status etc., as distinguished from questions of property, two male witnesses are necessary: (c) in questions relating to property, the evidence of one man and two women, or one man and the claimant's oath, or two women and the claimant's oath, will suffice: (d) in matters of which women alone are cognisant, e. g. childbirths etc., two women will be received: (e) written evidence will be admitted on proof of authenticity by the testimony of two male witnesses: (f) evidence of common report will be accepted in support of long continued possession, marriage or its dissolution, disputes between spouses, gifts and some other cases (g) hearsay or reported evidence will be admitted in the case of deponents at a distance under certain conditions: (h) the evidence of minors will be accepted in the case of a number of boys being together, and one of them being drowned etc. where no male adult evidence is available: see rule 212.

Contradictory evidence. Testimonies offered on the one side and on the other, are to be reconciled so far as possible: where this cannot be done, evidence establishing the origin of the ownership will be preferred. The reputation of witnesses is to be considered, rather than their number: the

evidence of two men is better than that of one man and two women, and the latter again is to be preferred to the evidence of one man coupled with the oath of the claimant. Possession is a ground of preference when corroborated by oath; but it may be overcome by proof of title: the possession must have endured for ten months, and have been peaceable and uninterrupted.

Admission, discrediting etc. of Witnesses. There is one respect in which the Cadi exercises more important powers than any European judge. Only individuals personally known to him as being ʿadl, i. e. honourable and observant of their religious duties, are to be admitted to give evidence. The reason of this peculiar rule is the dignity and quasi-religious character which Muslim law assigns to the rôle of witness. The testimony of a man who is not ʿadl e. g. one who is irreligious, a drinker of wine, a non-Muslim etc., cannot be admitted under any circumstances: the Cadi cannot accept his declaration, we are told, "even though he knows "that he is speaking the truth." On the other hand, the Cadi may not reject the testimony of a witness who is ʿadl, "even if his evidence is contrary to what the Cadi himself "knows to be the case:" (see Tuḫfat-al-Ḫukkām, edition by Houdas and Martel, verses 45, 47). The Cadi is to judge of the credibility of witnesses out of his personal knowledge, or what he may ascertain with regard to them by means of secret inquiry. When in doubt, he will abstain from giving any decision.

Such a system, however objectionable to European ideas, on the ground of being inquisitorial and mechanical at once, is perfectly capable of being acted upon in a small and more or less permanent community. But what is to be done in a populous city or in a place where strangers from a distance are constantly coming and going? Obviously the rule as to witnesses being personally known to the Cadi must be relaxed in some way; and accordingly we find the rules of law providing for the accrediting of witnesses who have not, by the testimony of two or more who have, the necessary qualification of being personally known to the Cadi: see rules 209—214. The accrediting testimony takes the form of a declaration that the person in question is "honourable and acceptable" (ʿadlun riḏan): the process of accrediting thus comes to be known as taʿdīl.

But if testimony be thus received to habilitate a witness whom it is desired to have admitted, it is a natural conse-

quence that testimony must also be admitted to impugn the character of persons who might otherwise be received. This is the converse process and is known as tajrīḥ; after the Cadi has accepted evidence on the one side, it is his duty to call upon the other side to bring testimony, (if they are in a position to do so), to show that the witnesses brought by the first party are unworthy of credit. A litigation, therefore, may resolve itself into a contest, not so much as to the facts in issue, as to the reputability, religious character etc. of the witnesses on either side. Living with a son who drinks wine, illicit relations with women, inattention while saying prayers, non-performance of ablutions, trafficking in musical instruments, putting his father to his oath in a litigation: such are few of the grounds on which the law allows the testimony of witnesses to be discredited. Enmity to the opposite side to that on which the witness is called; suspicion of a profit to be derived by a witness from his testimony: too great keenness in offering testimony; the fact of the witness being brought from a great distance; mendicancy; interest in the success of the party by whom the witness is called: such are a few more grounds of exclusion less strange to European ideas. Where the matter is in doubt, the witness is to be rejected: that is to say, where the witnesses for and against his reputability are equal in numbers and reputation, the latter will prevail.

But how are these rules to be applied, in the case for example, of a dispute which has arisen among a caravan of strangers from a distance? It will commonly be impossible for such persons to find witnesses of position, personally known to the Cadi, to testify to their reputability. The law accordingly tolerates a further departure from the ordinary rules in such a case: provided that the witness's exterior testifies in his favour, the Cadi will admit him to give evidence, but only in connection with matters between his travelling companions etc. Without this restriction, the liberty thus given might result in passing strangers being brought as witnesses in evasion of the ordinay rules.

APPENDIX B.

230*a*, 230*b*. Al-Gharrā'ān. The case dealt with in these rules are known by the names of al-Gharrā'ān or al-ʿUmarīyatān. They have their origin in the difficulty found in reconciling a general rule deduced from the Ḳur-ān

(viz: that a male heir shall receive a share equal to that of two female heirs) and a specific direction therein (Sūrah IV, verse 12) that where the deceased leaves no children, but his ascendants inherit, the mother shall have a third.

First case of al-Gharrā'ān. Suppose a man dies leaving a wife, a mother and a father: by the ordinary rules the widow would take one-quarter, the mother one-third, and the father the remainder, that is to say $^5/_{12}$ as compared with the widow's $^4/_{12}$.

But by the rule, that a male is entitled to double the share of a female, he should receive $^8/_{12}$. The distribution is re-adjusted, therefore, by the mother being given one-third of the remainder, after payment of the widow's share, instead of one-third of the whole inheritance: and the portions will then work out as follows:

Widow . . . . $^1/_4$
Mother . . . . $^1/_3$ of remainder $= ^1/_3 \times ^3/_4 = ^1/_4$
Father . . . . the remainder $= 1 - (^1/_4 + ^1/_4) = ^1/_2$

Second case of al-Gharrā'ān. Suppose the deceased, being a woman, leaves a husband, a father and a mother: according to the ordinary principles of distribution, the husband would receive one-half, and the mother one-third of the whole inheritance: so that all that would remain to the father would be one-sixth. He would therefore have merely half what the mother received.

To avoid this result, the mother is again given, not one-third of the whole, but merely one-third of what is left after payment of the husband's share. Accordingly the distribution will work out as follows:

Husband . . . $^1/_2$ of the whole.
Mother . . . $^1/_3$ of the remainder $= ^1/_3 \times ^1/_2 = ^1/_6$
Father . . . the remainder $1 - (^1/_2 + ^1/_6) = ^2/_6 = ^1/_3$

It is necessary to distinguish between these two cases known al-Gharrā'ān and the case known as al-Gharrā' explained in Appendix Q.

APPENDIX C.

221. "*A third*", *a sixth*". "Each of his parents shall, have a sixth, if he leaves a child: if he leaves no child his ascendants succeed, his mother shall have a third; if he leaves brothers, the mother shall have a sixth". Kur-ān IV, 12.

"*Reduction*". When the deceased leaves several near relatives, it may occur that the sum total of the various fractions

falling to the sharers exceeds unity. Suppose, for example, the heirs are a mother, a sister german or consanguinean and a husband: their shares will be respectively a third, a half and a half, making in all $8/6$, or an improper fraction. How is the estate to be distributed? The question perplexed the early jurists considerably, but the process ultimately adopted consisted in bringing all the fractions to terms of one common denominator, and then augmenting that denominator in every case by such a number (one, two, three or even five) as will make it equal to the sum of all the numerators.

Example 1. In the case supposed above, the reduction will be as follows:

Mother	$1/3 = 2/6$
Husband.	$1/2 = 3/6$
Sister german.	$1/2 = 3/6$

The sum of these fractions, $(2/6 + 3/6 + 3/6)$ is $8/6$: add two to the denominator, and the fraction becomes $8/8$ = unity.

The fractions in terms of the new denominator will be:

Mother	$2/6$	reduced to $2/8$
Sister german	$3/6$	» » $3/8$
Husband . . .	$3/6$	» » $3/8$
		$8/8$ = unity.

Example 2. Suppose the deceased, a female, leaves a husband, a mother, a sister german, a sister consanguinean, a sister uterine: the distribution will be as follows:

Husband	$1/2 = 3/6$	reduced to $3/9$
Mother	$1/6$	» » $1/9$
Sister german	$1/2 = 3/6$	» » $3/9$
» consanguinean	$1/6$	» » $1/9$
» uterine	$1/6$	» » $1/9$
		$9/9$ = unity.

"*Brethren whatever they are*": i. e. brothers or sisters whether german, consanguinean or uterine, and even though themselves excluded by the grandfather.

APPENDIX D.

232. *Sharers and Agnates.* Heirs are of two kinds: (a) *Sharers*, entitled to a fixed share specified in the Ḳur-ān; (b) *Agnates* or *residuaries*, whose share is not so determined. The common rule is that the sharers are to be satisfied first, and the remainder will then fall to the agnates: but complications arise owing to certain heirs occupying a varying

position between the two classes. The father is an extreme example of this nature: he will inherit:

(1) *as a sharer only*, where:

(I) the deceased leaves a male descendant; or

(II) on payment of the other sharers merely one-sixth or less than one-sixth remains: or

(III) nothing remains, and reduction is necessary in order that he may obtain a share:

(2) *as a residuary only*, where the deceased leaves no descendants, male or female:

(3) *as both sharer and residuary*, where the deceased leaves female descendants only, and more than one-sixth remains after payment of the sharers.

APPENDIX E.

235. *Son.* A son is always an agnate. He excludes all more remote agnates and can never himself be entirely excluded from succeeding. The most disadvantageous case which can occur for him will be to succeed to his mother where she has left father, mother and husband and many daughters surviving her: the father would receive $^1/_6$, the mother $^1/_6$, the husband $^1/_4$, and the remainder of $^5/_{12}$, would fall to be divided between the son and daughters in the proportion of 2 : 1. Thus, if there are four daughters and one son, 72 is the lowest denominator which will admit of division among them in that ratio: and the residue will be $^5/_{12} = {}^{30}/_{72}$, of which son will receive $^{10}/_{72}$ or ten shares; each daughter $^5/_{12}$ or five shares.

APPENDIX F.

237. *Assimilation of descendants etc.* It is a general principle running through the law that descendants come in the place of ascendants *et vice versa*: numerous exceptions, however, exist. A grandson, for example, is in a less favourable position than a son, inasmuch as (unlike the former) he may be entirely excluded by a combination of other heirs. Thus, suppose the deceased leaves two daughters, a father, a mother and a grandson: the two daughters (not being agnatised by a grandson, though they would be so by a son, see rule 238) will receive $^2/_3$; the father will be entitled to $^1/_6$; the mother to $^1/_6$; and the estate being thus exhausted the grandson will receive nothing.

APPENDIX G.

238. *Agnatisation of female heirs.* The ratio 2 : 1 as between males and females is another general principle in succession: cf. above rules 226, 228, where it will be seen that the husband's share in his wife's estate is double that to which she will be entitled on survivorship. In the case of sons and daughters, it is expressly declared in the Ḳur-ān: "God commands you in the distribution of your goods among your "children, to give a son the portion of two children." Sūrah IV, 12. The direction is the same with regard to brothers and sisters: "If there are brothers and sisters: [i. e. german "or consanguinean] each brother shall have a portion equal "to that of two sisters." Surah IV, 175. (An exception to this rule occurs, however, in the case of brothers and sisters uterine; their right is based on a different verse of the Ḳur-ān: "If the succession of a man or of a woman is taken "by relatives other than his father or his son, and the man, "or the woman, has a brother or a sister [i. e. uterine], each "of the latter shall have a sixth; if they are more numerous, "they shall share the succession." Sūrah IV, 15. This is construed as referring to brothers and sisters uterine, and as indicating an equal division, i. e. a sister to receive the same as a brother: cf. rules 255—257).

Such a direction seems simple enough in itself: account, however, has to be taken of the distinction between the two classes of heirs, (a) sharers, and (b) residuaries or agnates (r. 232, App. D); whence arise various theoretical niceties which have also practical consequences attached. When a daughter shares along with sons, or a sister along with brothers, is she a sharer or a residuary? The Muslim jurists reply, she is a residuary, having been *agnatised* (or, as they express it, rendered ʿa s̲ a b a h *by another*, عصبة بغيره) by the existence of a male heir of the same class and degree. This process of *agnatisation* plays a considerable part in the law: other examples of it will be found in rules 246, 247, 250, and appendices J, K, where it will be seen that the agnatising heir may be, not merely a brother, but a cousin, a nephew, grandnephew etc., or even another female heir: the justification of the wide extension thus given to the directions of the Ḳur-ān being the principle of assimilating descendants referred to in rule 237, Appendix F. As a formula concisely stating the ordinary (or more restricted) process of agnatisation, the following may be found convenient: "*A son,*

a grandson, a brother german or a brother consanguinean, succeeding along with one or more female heirs of the same class, degree and blood, will confer on them the character of residuaries." For the meaning of *class, degree, blood,* see Appendix L: such is the general rule, viz. that there must be *equality* in these three respects; an exception is merely admitted where the female heir would otherwise be without any share whatever in the succession. See Appendix J.

APPENDIX H.

243. *Complement of the two thirds.* This rule, in so far as regards the share awarded to the grand-daughter, results from (a) the principle of the assimilation of descendants to ascendants (App. F), and (b) the provisions of the Ḵur-ān assigning half the succession to one daughter, and two thirds to two or more daughters (rule 241). Suppose the deceased leaves a daughter and a grand-daughter: the former is entitled to $^1/_2$, or $^1/_6$ less than would have gone to her and a sister, had she had one: (since $^2/_3 - {}^1/_2 = {}^1/_6$): this "complement of the two-thirds" is therefore assigned to the grand-daughter, as a quasi-daughter, without however reducing in any way the share of the daughter.

APPENDIX I.

244. *Grand-daughters.* The meaning is that in the case dealt with in the preceding rule (r. 243), where there are (instead of one grand-daughter as there supposed) two or more grand-daughters, they will share the complement of the two-thirds (i. e. one-sixth) among them; and the residue (i. e. one-third) will go to the nearest agnate e. g. the deceased's brother, uncle etc.

APPENDIX J.

246, 247. *Agnatisation of grand-daughters.* Grand-daughters will be agnatised by

(a) a brother, the deceased's grandson by the same son as the grand-daughter:

(b) by a cousin, the deceased's grandson by another son;

(c) by a great-grandson or other descendant of the deceased

through males, of a lower degree than her own, i. e. standing to her in the relation of nephew, grand-nephew etc.

But in this last instance of agnatisation, ((c) above), she will become ʿa s a b a h only in case she is entitled to no share as one of the sharers: if on the other hand, she receives for example, one-sixth as *complement of the two-thirds*, coming to the succession with one daughter only of the deceased, she will not be agnatised, but will take the one-sixth merely as a sharer.

APPENDIX K.

250. This is a further kind of agnatisation, viz. one or more females being agnatised, not by the existence of a male heir, but by that of another female heir or heirs. Sisters german or consanguinean will be rendered what is called agnates along with others (a) by a daughter or daughters of the deceased; (b) by a grand-daughter or grand-daughters of the deceased: provided that there is no brother of the same strength of blood, by whose existence they would be rendered agnates through others. The purpose of the agnatisation is to avoid injustice to daughters of the deceased, in cases where their shares would be reduced by those of the sisters. Suppose, for example, the deceased leaves two daughters, and two sisters. The two daughters would be entitled to two-thirds: the two sisters would also be entitled to two-thirds: this would take make up $^4/_3$, which being in excess of unity, reduction would be necessary: that is to say, the common denominator would be raised from three to four, and the daughters' share, instead of $^2/_3$, would become $^2/_4$ or $^1/_2$. The daughters being entitled to the preference over the sisters, the above result is obviated by giving the former their full two-thirds, and the remainder to the sisters in the character of agnates along with others.

APPENDIX L.

251. *Al-Jabari's Rule.* The exclusion of brothers by any male descendant of the deceased, or by a father, is an instance of harmony between (a) the rules of Arab agnatic succession, and (b) those which prevail in European legal systems. There are, however, numerous instances in which the two differ widely. For example, Arab agnatic succession presents the following peculiarities: (1) no distinction between

movable and immovable property; (2) no primogeniture; (3) division of heirs into classes, not on the broad lines of descendants, ascendants, and collaterals, but on a special six-fold classification explained below; (4) non-admission of the principle of representation, and rigid exclusion of more remote heirs by those nearer in degree; (5) (as another application of the same principle) distribution *per capita*, never *per stirpes*; (6) preference given to heirs german over heirs consanguinean.

With reference to (4) *non-admission of representation*, it is necessary that the student should distinguish clearly between *representation* (which term we use in the ordinary sense in which it is employed in Roman or in English law) and the *assimilation* of descendants to ascendants described in Appendix F. To illustrate the distinction we may take the case of the Prophet himself. His father, ᶜAbdallah, predeceased *his* father, died a poor man before the Prophet (a posthumous child) was born: but the grandfather ᶜAbd-al-Muṭṭalib, left considerable property, to a share in which Muḥammad would have been entitled under any European system of inheritance, as representing his deceased father. By Arab succession law, however, any claim which he might otherwise have had was entirely excluded by the fact that his grandfather left other sons (i. e. uncles of the Prophet) surviving him, who, being nearer in degree, absolutely debarred grandsons. This exemplifies the rule against *representation*. — To illustrate that in favour of *assimilation*, it is only necessary to imagine the case of the grandfather having left no sons surviving him: in that event the Prophet, a grandson, would have come in the place of a son, and have received the whole inheritance, or an equal share in it along with other grandsons, if there were any.

The rules according to which, under Muslim law, residuary or agnatic heirs are preferred one before another, have been concisely expressed by an Arab writer in a verse which may be translated:

"*Class* must in first place be preferred;
Degree comes next, and *blood* is third".

These terms, "class", "degree" and "blood", require some explanation.

"*Class*": agnates are divided into six classes, viz: — (1) descendants through males, son, grandson, great-grandson etc.: (2) the father: (3) the grandfather and the brothers: (4) the nephews, brother's sons: (5) the uncles: (6) the patron.

"*Degree*" means the degree of relationship in which the

heir stands to the deceased as ascertained by the number of removes: e. g. the son and the father are in the first degree, there being no intermediary between them and the deceased; the grandson, the grandfather and the brother are in the second degree, one intermediary being involved in each case; the great-grandson and the nephew are in the third, etc., etc.

"*Blood*" means that the heir is either of the full blood, or the half blood, the former being preferred to the latter: e.g. a brother german will exclude a brother consanguinean: the brother uterine not being an ʿaṣabah is not here in question).

The rule, therefore, operates in the following way:

(1) A, an heir belonging to the first class will exclude B, an heir of the second or any lower class, notwithstanding that B may stand in a nearer degree of relationship to the deceased, and be of the full blood, whereas A is merely of the half blood.

In like manner an heir belonging to the second class, will exclude an heir belonging to the third class, notwithstanding that the latter may stand in a nearer degree of relationship, etc.

(2) Where two heirs belong to the same class, the one which stands in a nearer degree of relationship to the deceased will exclude the other: if they are both in the same degree they will share equally.

(3) Where two heirs belong to the same class and stand in the same degree of relationship to the deceased, the one which is of the full blood, i. e. related to the deceased both through father and mother, will exclude the other, if merely of the half blood, i. e. related to the deceased through the father only.

Illustrations. (A) The deceased leaves a son and a father: the son belongs to the first class, and the father to the second class, therefore the son is preferred.

(B) The deceased leaves a son and a grandson: both are of the first class; but the son is in the first degree, and the grandson in the second degree; therefore the son is preferred.

(C) The deceased leaves an uncle german (brother of the deceased's father, through both father and mother) and an uncle consanguinean (brother of the deceased's father through the father only): both belong to the same class and stand in the same degree of relationship to the deceased, but the uncle german, being of the full blood, is preferred to the uncle consanguinean, who is of the half blood.

APPENDIX M.

255, 256. *Brothers and Sisters uterine.* It is important to note the wide difference between (a) brothers german and consanguinean, and (b) brothers uterine. The former succeed as ʿaṣabah or residuaries in accordance with the rules of pre-Islamic Arab succession: the latter, not being related to the deceased at all through males, but merely through their mother, had no right of succession whatever by pre-Islamic rule, but owe their position as heirs to a verse in the Ḳur-ān: "if the succession of a man or of a woman is taken by "relatives other than his father or his son, and the man or "the woman has a brother or a sister [uterine], each of the "latter shall have a sixth of the succession; if they are more "than one, they shall divide a third of the succession". Sūrah IV, v. 15. Brothers and sisters uterine occupy an anomalous position in various ways: for example, (1) brothers and sisters share alike, contrary to the general rule by which a male heir receives a portion equal to that of two female heirs, (see rules 228, 232, 238 and App. G); (2) they may succeed along with the person through whom they are related to the deceased, i. e. their mother, contrary to a general rule by which an intermediate heir when alive, debars those claiming relationship through him or her (r. 278); (3) they reduce the mother's share from a third to a sixth, (r. 231, App. C) instead of being excluded by her, in accordance with the general rule just referred to. Brothers and sisters uterine being sharers, not residuaries, will never be entitled to more than a third of the succession: a single brother or a single sister will be entitled to a sixth; if there are a brother and sister, or more than one of either sex, they will divide a third among them *per capita*.

The positions of brothers german and brothers uterine being thus dissimilar, it would seem as if they could never have anything in common: there is, however, one peculiar case in which they will be grouped together. The brother german, though a typical agnate, will succeed in the character of a sharer, being assimilated to a brother uterine in the case known as "al-Mushtarakah" or "Participation." This arises in the following manner. Suppose a woman dies leaving a husband, a mother, two or more brothers or sisters uterine, and brothers german: the husband will be entitled to a half; the mother to one-sixth, and the brothers uterine to one-third; these shares, $\frac{1}{2} + \frac{1}{6} + \frac{1}{3}$, absorb the whole estate: so that the

brothers german in the character of ʿaṣabah would receive nothing. To prevent this anomaly a brother german is, in this particular case, but in no other, considered as a sharer, and admitted to the third of the estate falling to the brothers uterine, along with the latter. The same problem, with the same solution, may occur in one or two other ways: a grand-mother, or grandmothers, having also right to a sixth may take the place of the mother in the instance above given; and two sisters uterine may replace the two brothers uterine. But exceptions being matters of strict law, the privilege thus granted to brothers german will not be extended to nephews (r. 268); nor to brothers consanguinean (r. 264); nor to a brother consanguinean and a sister consanguinean (r. 284, App. N); while a sister or sisters german or consanguinean occurring alone, instead of brothers german would receive their ordinary shares ($^1/_2$ or $^2/_3$) without the necessity of any exceptional course.

APPENDIX N.

284. *Excluded heirs, effect of.* An apparent exception to this rule is the case of al-karīb al-mashʾūm or the "*Unlucky kinsman*", as it is commonly called: the title of *unlucky* being given to a relative, who, himself receiving no share of the inheritance, has yet the effect of depriving, by the fact of his existence, another relative of a share to which she would be entitled.

Suppose, for example, that the deceased, a female, leaves a husband, a mother, a father, a daughter, a grandson, and a grand-daughter: the husband will have $^1/_4$; the mother $^1/_6$; the father $^1/_6$; the daughter $^1/_2$; and but for the existence of the grandson, the grand-daughter would also receive $^1/_6$ as *complement of the two-thirds.* The existence of the grandson, however, renders her ʿaṣabah; and as the sum of the shares falling to the other heirs, viz. $^1/_4 + ^1/_6 + ^1/_6 + ^1/_2 = ^{13}/_{12}$, exceed unity, there will be nothing for her to receive in the character of ʿaṣabah. The grandson has thus excluded her without benefitting himself.

Another example, which approaches, without constituting the case of al-mushtarakah, may be given as exemplifying at once the strictness of the law with regard to that exceptional case (App. M), and the working of the "Unlucky kinsman" in contrast thereto. Suppose a woman leaves a husband, a mother, a brother uterine, a sister german, a

sister consanguinean and a brother consanguinean. The distribution will be

Husband . . .	$^1/_2 = ^3/_6$	reduced to	$^3/_8$
Mother. . . .	$^1/_6$	» »	$^1/_8$
Brother uterine	$^1/_6$	» »	$^1/_8$
Sister german .	$^1/_2 = ^3/_6$	» »	$^3/_8$
			$^8/_8$

But for the existence of the brother consanguinean, the sister consanguinean would have been entitled to the "complement of the two-thirds" in the character of a sharer (r. 253); but being agnatised by the existence of a male of the same class, degree and blood (r. 249), she falls to be dealt with as a residuary: that is to say, all she can claim is an equal share in the residue, and the whole estate being exhausted by the shares, there is no residue available.

The "unlucky kinsman", it may be noted in passing, is always in the same degree as the kinswoman whom he excludes; for example, a brother of the sister or grand-daughter excluded: or in the case of a grand-daughter, he may also be a cousin.

These cases of the "unlucky kinsman", however, it may be said, are really distinguishable from cases of exclusion proper, or of reduction, by an excluded heir (r. 284, note): since the exclusion operated by the "unlucky kinsman" is, as it were, merely an exclusion *de facto*, the female relative excluded being still *de jure* an heir: only her heirship is of no advantage to her, owing to the absorption of the whole succession by the shares. Exclusion proper, on the other hand, or the diminution of an heirs share, means something more than this: it implies an extinction or modification of the right of the heir affected, apart from any questions as to competition with other heirs. — Contrast the case of a person under impediment (مانع), whose existence can in no case affect the right of another (rule 283, note).

APPENDIX O.

294—299. *Competition between grandfather and brothers and sisters.* The father if alive, excludes the grandfather: but where there is no father living, the grandfather enjoys in general the same right as a father would have enjoyed: taking, for example, one-sixth of the inheritance in the character of a sharer, where there are one or more male descendants of

the deceased (r. 233); and the residue, (if any), after payment of the other shares, in the character of ʿaṣabah, where the deceased has left only female descendants or no descendants of either sex (r. 234).

Differences, however, between the rights of a grandfather and those which would have been accorded to a father in the same circumstances, arise, when the grandfather has for competitors in the inheritance brothers german or consanguinean of the deceased. These stand to the deceased in the same degree of relationship as the grandfather, viz. in the second degree: but the grandfather belonging to the class of ascendants, the brothers to that of collaterals, the grandfather would naturally be preferred and exclude the brothers. Against this, however, there is the fact that the grandfather, unlike the father, is not an intermediary connecting the brothers with the deceased, and so entitled to exclude them. Accordingly, as the most equitable solution of the difficulty, the jurists have grouped the grandfather and the brothers together, as constituting the third class of ʿaṣabah and dividing the residue among them *per capita*, subject to certain special rules.

The grandfather is conclusively presumed to choose in every case, the share or portion falling to him whether as sharer or residuary, which will be largest in amount in the particular circumstances of the case; as those circumstances may vary greatly, the determination of his rights is a matter of some intricacy.

Thus, for example, his choice will vary according as (a) there are other sharers besides himself and the brothers, or (b) there are no sharers. Again, the number of the brothers may make it to his interest either (1) to share along with them, or (2) to take such portion of the inheritance as he may be entitled to in the character of sharer.

Where there are no other sharers besides the brothers and himself, the grandfather is allowed one-third of the whole inheritance in his character of sharer. If, however, it is more for his advantage to divide the estate equally along with the brothers and sisters, he will do so. For example, if the deceased leave three or more brothers it will be to his interest to take one-third as sharer; since as a residuary, he would merely receive one-fourth or less. On the other hand, if the deceased leaves less than two brothers, i. e. one brother, or one brother and a sister — two sisters counting as one brother — it will be to his interest to take his portion as a residuary. If the deceased leaves merely a grandfather and

one sister, it will be still more to the interest of the grandfather to take in the character of a residuary, since as such, he will be entitled to two-thirds of the inheritance; where there are two sisters, the grandfather will have a half. Where there are three sisters, or a brother and a sister, the grandfather will have two-fifths of the inheritance. Where the result would be the same, in whichever character he takes, e. g. where there are two brothers or a brother and two sisters or four sisters, he is doomed to take in his character of sharer.

Where there are other sharers, the grandfather will still take in the character which is most to his advantage; and accordingly he may either divide, equally with the brothers and sisters, the residue of the estate after payment of the other shares; or if his portion in this way would be less than one-third of the residue, he is entitled to take a third of the residue as a sharer (just as where there were no other sharers, he was entitled to take a third of the whole inheritance). In no case can he receive less than one-sixth of the whole inheritance, and this fraction it will be his interest to take in his character of sharer, where his portion as ʿaṣabah, and also the one-third of the residue mentioned above, would be less than a sixth of the whole estate.

APPENDIX P.

302. *Sister german and brother consanguinean.* A grandfather succeeding along with sisters german or consanguinean, in the absence of brothers, will render them ʿaṣabah as the existence of a brother would have done: and will then, (like a brother), share with them in the ratio of two to one: but (unlike a brother), the grandfather, even along with the sister, will not reduce the mother's share to one-sixth. Sisters german, like brothers german, may include any brothers consanguinean which there may be in order to reduce the grandfather's position (rr. 284, 301): but unlike a brother german, a single sister german will not always derive the entire benefit arising from their inclusion. It may occur that what remains after satisfaction of the grandfather and the other sharer, exceeds one-half of the whole succession; in this case the sister will receive merely her half as sharer, and the remainder will go to the brothers consanguinean; e. g. suppose the deceased leaves a grandmother, a grandfather, and a brother consanguinean and a sister consanguinean: the grandmother

is entitled to $^1/_6$, the grandfather taking $^1/_3 \times ^5/_6 = ^5/_{18}$, there will remain $^{13}/_{18}$: of this the sister will take $^9/_{18}$, or one-half of the whole succession; and the remainder $^5/_{18}$ will go to the brother consanguinean.

APPENDIX Q.

306. Al-Gharrā'. The limitation of the sister to one-half of the whole, referred to in the note to rule 302, goes to indicate that her right of succession in those cases is in the character of sharer, rather than in that of ʿaṣabah: on the other hand, she can never claim the benefit of a *reduction*, in case the fraction falling to her after satisfaction of the grandfather and other sharers, falls below one-half: this would seem to indicate that she is not properly a sharer, but occupies a sort of intermediate position. An example of the disadvantage under which she suffers in thus being debarred from the benefit of reduction may be given: Suppose the deceased leaves a grandfather, a sister german and two brothers consanguinean: the husband will receive $^1/_2$: the grandfather $^1/_3$ of the remainder $= ^1/_6$ of the whole; therefore merely $^1/_6$ will be left for the sister german, as compared with $^1/_2$ to which she would be entitled as a sharer. A *reduction* would give her $^3/_7$, being $^2/_{21}$ more than she actually receives. Or suppose the deceased leaves a widower, a grandfather, two sisters german and two or more brothers consanguinean: the widower will receive $^1/_2$: the grandfather, $^1/_3$ of the remainder $= ^1/_6$ of the whole: thus leaving merely $^1/_3$ for the sisters german, as compared with $^2/_3$ which they would be entitled to as sharers, and $^4/_8 = ^1/_2$ which they would receive were a reduction allowed.

There is, however, an exceptional case here referred to as al-Gharrā' (otherwise known as al-Akdarīyah), in which the sister will be granted the benefit of a reduction, viz. where she comes to the succession along with the grandfather, the widower and the mother. The reason for allowing the exception is the hardship which would otherwise be entailed on her; since, the widower taking $^1/_2$, the mother $^1/_3$, and the grandfather $^1/_6$ as his minimum share (App. O), the sister german would receive nothing. To avoid this the calculation is made on the basis of her being entitled to $^1/_2$ in the character of sharer, and on the application of reduction the result is as follows:—

Widower . .	$^1/_2 = ^3/_6$ reduced to	$^3/_9$	. . . . . .	$^9/_{27}$
Mother . . .	$^1/_3 = ^2/_6$ » »	$^2/_9$	. . . . . .	$^6/_{27}$

Sister german $^1/_3$	of remainder	$^1/_3 \times ^4/_9$	$^4/_{27}$
Grandfather . $^2/_3$	» »	$^2/_3 \times ^4/_9$	$^8/_{27}$

This case is exceptional also as a departure from the rule that the grandfather is entitled to his minimum share of one-sixth under any circumstances, to the exclusion of the sister german.

The student is warned against confusing this case of al-Gharrā' with the two cases known as al-Gharrā'ān mentioned in Appendix B.

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